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COMPENDIUM

MERCANTILE LAW.

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OF THE INNER TEMPLE, ESQ., ATTORNEY AT LAW.

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HARRISON AND DENNING, LAW STATIONERS,

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A
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OF
MERCANTILE LAW.

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BY

JOHN WILLIAM SMITH,

OF THE INNER TEMPLE, ESQ. BARRISTER AT LAW.

LONDON:

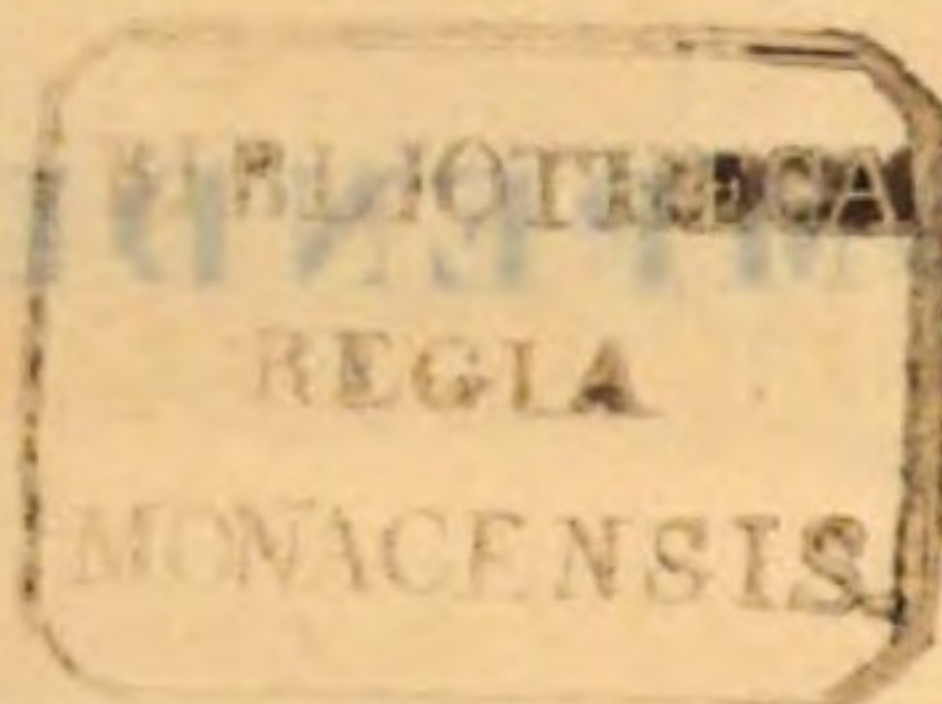
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PREFACE.

THE idea of this work was suggested by Mr. Burton's Compendium of the Law of Real Property. The acknowledged utility of that book induced me to believe, that an attempt to compress the chief doctrines of an equally important branch of law into a treatise of similar dimensions, might not prove altogether useless. The Mercantile Law, is, in one respect, better adapted to such compression, than the Law of Real Property; inasmuch as the reasons upon which the former is based, can be explained, more shortly, than those which support the latter. The reasons upon which our Law of Real Property is founded are, generally speaking, historical; and part of history must, therefore, be recounted, in order to explain them clearly and philosophically; while the Mercantile Law is deduced from considerations of utility, the force of which the mind

perceives as soon as they are pointed out to it. For instance, if I were desirous of explaining, why a rent-service cannot be reserved, in a conveyance, by a subject, of lands in fee-simple; I should be obliged to show the feudal relation that existed between lord and tenant, the nature of subinfeudations, and how the lord was injured by them in such his relation to his tenant, how the statute *quia emptores* was enacted to prevent this injury, in consequence of which statute, a tenure, without which no rent service exists, cannot be raised by a conveyance from one subject to another in fee simple. In like manner, the explanation of a recovery, of a fine, of a copyhold, of an estate in ancient demesne, of an use, or of a trust, would require a process of historical deduction. But when the reader is told, that the drawer of a bill of exchange is discharged, if timely notice be not given him of its dishonour; because, without such notice, he might loose the assets he has placed to meet it in the drawee's hands; or, that if A. hold himself out to me as B.'s partner, he will be liable to me as such; because he might else enable B. to defraud persons who had trusted him upon the faith of the apparent partnership and joint responsibility; when these reasons, and such as these, are given,

every man at once perceives their cogency, and needs not be told *how*, that he may know *why*, the law was settled on its present footing. The fitness of this subject for compression is, therefore, I think hardly questionable. The difficulty of compressing it, is, however, extreme: the author who attempts to do so, must continually keep in view a triple object, must aspire, at once, to clearness, brevity, and accuracy; a combination so difficult, that its difficulty may, I trust, be fairly pleaded in excuse for some of the deficiencies and imperfections, which the reader may discover in the following pages, and which would have been still more numerous, but for the kind assistance of friends, to whom I take this opportunity of returning my sincere acknowledgments.

J. W. S.

10, King's Bench Walk, Temple,

August 1, 1834.

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A. H. S.

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London, August 1, 1844.

It is not, perhaps, necessary to state, that the following pages are intended to be a summary of the law, as it stands at the present time, and not a treatise on the subject. It is intended to be a summary of the law, as it stands at the present time, and not a treatise on the subject. It is intended to be a summary of the law, as it stands at the present time, and not a treatise on the subject.

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SUPPLEMENT

TO

THE COMPENDIUM OF MERCANTILE LAW.

A FEW days after the publication of this Treatise, two Acts of considerable importance received the Royal Assent, the provisions of which are here shortly abstracted. Stat. 4 & 5 W. 4. c. 49. and stat. 4 & 5 W. 4. c. 94.

The former of these Acts respects the law of *Weights and Measures*, treated of at page 318; its chief object is to enforce that uniformity throughout the kingdom which was aimed at by stat. 5 G. 4. c. 74, which it does not repeal, although, as will be seen, it slightly varies some of its provisions.

The latter concerns *Joint Stock Companies*, treated of at page 35, and obviates the necessity, to which each of those bodies was formerly subjected, of incurring the expense of obtaining a private Act of Parliament passed for its own peculiar regulation, by enabling His Majesty to grant the necessary powers by letters patent.

Their chief enactments are to the following effect:—4 & 5 W. 4. c. 49, 13th August 1834, recites 5 G. 4. c. 74, and 6 G. 4. c. 12., and repeals so much of them as required conformity in shape to the models deposited in the Exchequer, or allowed the use of other Weights and Measures than the imperial ones, *under any circumstance whatever*. The doubt raised in *Watts v. Friend*, 10 B. and C. 448, ante p. 318, n. *d*, is thus put an end to.

By sec. 2 & 3, all Weights and Measures that have been, or shall be verified and stamped at the Exchequer, as copies of the standard, corresponding in length, weight, and capacity thereto, are legalised, though differing in shape from those deposited at the Exchequer.

By sec. 4, the heaped measure is abolished, and the use of it and of weights made of lead or pewter is prohibited from January 1, 1835.

Sec. 5 to 11, contain provisions for supplying copies of the standard Weights and Measures for the use of the different parts of the United Kingdom, and for the appointment of an inspector of Weights and Measures in each county.

By sec. 12, it is directed that from Jan. 1, 1835, the stone shall contain 14 pounds avoirdupois, the hundred weight 8 stones, and the ton 20 hundred weight, and the use of any other stone, &c. shall be illegal.

By sec. 13, after Jan. 1, 1835, all Weights, except avoirdupois, are abolished, except that gold, silver, platina, diamonds, or other precious stones, and drugs, when sold by retail, may be sold by troy weight.

By sec. 14, no Weights or Measures are to be used unless previously stamped by an inspector. Contracts by any others are void, and a penalty is imposed for disobedience.

The remaining sections of the act, provide for the good conduct of the inspector, the examination by magistrates of Weights and Measures within their jurisdictions, the punishment of counterfeits, and the replacing the standard when worn out.

4 & 5 W. 4. c. 94, reciting 6 G. 4. c. 91, by which the king was enabled to render the members of any corporation thereafter erected individually liable for its contracts, enacts, that it shall be lawful for His Majesty, after three months' notice shall have been given in the Gazette of his intention, by letters patent to grant to any company, or body of persons associated together, for any trading, charitable, literary, or other purpose, any privilege, which, at common law, or in pursuance of the above Act, it would be competent for His Majesty to grant to any such company, by charter of incorporation, and especially the privilege of maintaining and defending actions, suits, prosecutions and other proceedings, both at law and in equity, in the name or

names of any one or more of their principal officers for the time being, subject to such conditions, for the prevention of abuses in the management of their affairs, the security of creditors, and the protection of the public, as His Majesty shall see fit to impose. It is however provided, that in suits in equity against the company, any member may be joined as a defendant for the purpose of discovery.

An entry of the patent, and of the name of the principal officer from time to time appointed under its provisions, is to be made in a book, to be kept open for inspection, on payment of one shilling, in the office of the Clerk of the Patents; similar information is to be given by advertisement in the Gazette and some other paper published or circulating in the county or place where the meetings of the company are usually held; and on each change of the officer, like notice is to be given of the appointment of his successor. A decree, judgment, or order against the officer is to have the like effect on the property of the company, and upon the persons and property of every and any member thereof, as if such company and such member had been a party to such action, suit, or proceeding, and the judgment, decree, or order had been pronounced against the company, and every or any such member; but no execution is to issue without leave granted on motion in open court, after notice to the person or persons sought to be charged, nor after the expiration of three years after such person or persons shall have ceased to be a member of the company.

The principal officer is, in the first week in June and the first week in December every year, to file a true list of the members of the company, their respective places of abode, and description, with the Clerk of the Patents, for the inspection of the public.

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A COMPENDIUM

MERCANTILE LAW

INTRODUCTION

These Treatises will be divided into Four Books. The First, embracing Maritime Persons; the Second, Maritime Property; the Third, Maritime Contracts; the Fourth and last, Maritime Rights. A manual which supplies the student and practitioner with a complete code of the law, the various considerations respecting cases by which international law is carried on; that all they seek to acquire by so absorbing themselves, the arrangements which they set in the habit of making in order to do so effectively, and the mode in which the proper execution of these arrangements is enforced.

A COMPENDIUM

OF

MERCANTILE LAW.

INTRODUCTION.

THIS Treatise will be divided into Four Books. The First, concerning Mercantile Persons; the Second, Mercantile Property; the Third, Mercantile Contracts; the Fourth and last, Mercantile Remedies: A method which appears the simplest and most comprehensive; since it includes, under a few heads, the various considerations respecting those by whose intervention trade is carried on; that which they seek to acquire by so employing themselves, the arrangements which they are in the habit of adopting in order to do so effectually, and the mode in which the proper execution of those arrangements is enforced.

BOOK THE FIRST.

OF MERCANTILE PERSONS.

TRADE may be carried on by individuals, partnerships, corporations, and their respective agents. As every thing to be said in the ensuing pages must be understood as predicated of an individual, unless a contrary intention be expressly signified; it is unnecessary to devote any exclusive space to the description of a sole trader; the Bankrupt Laws, indeed, use that word in a definite and peculiar sense, which will be treated of in the Fourth Book, under the head of Bankruptcy.

CHAPTER I.

OF PARTNERS.

SECT. 1. *Partnership—what.*

2. *How formed.*

3. *How dissolved.*

4. *Rights of partners, inter se.*

5. *Rights of third persons against partners.*

6. *Rights of partners against third persons.*

7. *Joint stock companies.*

SECT. I.—*Partnership—what.*

PARTNERSHIP is the result of a contract, whereby two or more persons agree to combine property or labour for the pur-

pose of a common undertaking and the acquisition of a common profit. There may be partnership in one transaction as well as in a continuing business, and between persons out of trade as well as in trade, since, in either case, there may be a combination of property or labour, in order to a common undertaking and a common profit. (a)

This community of profit is the criterion whereby to ascertain whether a contract be really one of partnership, for one partner may stipulate to be free from *loss*, and the stipulation will hold good as between himself and his companions, (b) though it will not diminish his liability to strangers. (c) So one partner may contribute all the money, all the stock, or all the labour necessary for the purposes of the firm. But if there be not a community of profit there is no partnership; (d) while, on the other hand, where such community of profit exists, each of the sharers in it is, and may be treated by the creditors of the whole body as, a partner, although he may have stipulated with his companions not to be responsible for the engagements entered into by them with strangers, to whom he, notwithstanding, will be liable; and very justly so; for by taking a part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts; (e) and on this ground it is that a *dormant partner*, that is to say, one who is a sharer in the con-

(a) *Exp. Gellar*, 1 Rose, 297. *Salomons v. Nissen*, 2 T. R. 675.

(b) *Fereday v. Hornderne*, Jac. 144. *Gilpin v. Enderby*, 5 B. & A. 954, see 18 Ves. 300, unless indeed such stipulation be inserted as a mask to disguise usury. *Jestons v. Brooke*, Cowp. 793. *Morse v. Wilson*, 4 T. R. 353.

(c) *Waugh v. Carver*, 2 H. Bl. 235. Jac. 147, per *Ld. Eldon*.

(d) *Hoare v. Dawes*, Dougl. 371. *Coope v. Eyre*, 1 H. Bl. 37. *Finckle*

v. Stacey, Sel. Ca. Ch. 9. Many societies, such for instance as clubs, so far resemble partnerships, that each member is bound by certain acts of the rest, purporting to be done in furtherance of the common object. See *Delauney v. Strickland*, 2 Stark. 416. But these are not partnerships, though possessing some of the attributes thereof.

(e) Per *Eyre C. J.* *Waugh v. Carver*, 2 H. Bl. 235. See *Exp. Rowlandson*, 1 Rose, 89, and 17 Ves. 412.

cern but does not appear to the world as such, is held responsible for its engagements. (*f*)

If A. and B. agree together to contribute each a sum of money for the purchase of a lot of goods, which they intend afterwards to divide, in this case, after the purchase of the goods and before the division, they are joint-owners thereof, not partners. But if instead of dividing they sell them again, and divide the gain accruing upon the re-sale, now there is a community of profit, and they become, in the legal sense of that word, *partners*. (*g*) However, though the profit of partners must be joint, they may, if they think fit, arrange that it shall be unequally divided. (*h*)

Further it is to be observed, that to constitute such a *community of profit* as is here intended, a partner must not only share in the profits of his companions, but must share in them *as a principal*, *i. e.* he must not be a mere agent, factor, or servant, receiving in lieu of wages a sum proportioned to the profit gained by his employers. (*i*) Thus, where a broker

(*f*) Robinson *v.* Wilkinson, 3 Price, 538. Wintle *v.* Crowther, 1 Cr. & Jer. 316. 1 Tyrwh. 210. But though a stranger *may* sue such a partner along with the rest, yet he is not *obliged* to do so, on account of the difficulty of discovering him. Mullett *v.* Hook, 1 M. & M. 88. De Mautort *v.* Saunders, 1 B. & Ad. 398. overruling Dubois *v.* Ludert, 1 Marsh. 248. See also Exp. Hamper, 17 Ves. 412. Exp. Hodgkinson, 19 Ves. 294.

(*g*) The working of a mine, colliery, or other real property of that description, is looked on to some extent as a trade, and where several, having a common interest in such property, work it in common, and sell the produce for their common benefit, they become partners. Crawshay *v.* Maule, 1 Swanst. 495. Jeffreys *v.* Smith, 1 Jac. & Walk. 298.

See 2 Atk. 630. But mining concerns, though partnerships to most purposes, are not so to all. See Vice *v.* Lady Anson, 7 B. & C. 409. For they are not subject to dissolution on the death or bankruptcy of any of the partners, and the shares are transferrable without the consent of the other partners. Fereday *v.* Wightwick, 1 Russ. & Mylne, 45. We shall see presently that partners in a mine have not in general the power of binding one another by bills of exchange.

(*h*) Per Ld. Loughborough, Coope *v.* Eyre, 1 H. Bl. 48. Fromont *v.* Coup-land, 2 Bing. 171. Exp. Langdale, 18 Ves. 300.

(*i*) Dixon *v.* Cooper, 3 Wils. 40. Wilkinson *v.* Frazier, 4 Esp. 182. Mair *v.* Glennie, 4 M. & S. 240. Dry *v.* Boswell, 1 Camp. 330. Wish *v.* Small,

employed to sell indigo was to receive for his trouble, instead of commission, all he could get for it above 2s. 6d. a pound, the Court of Common Pleas held that he was an agent, not a partner, and, consequently, that he was admissible as a witness for his principal, in an action brought by him for the price of the indigo. (*k*) But where, in a subsequent case, a broker was not only to be paid in proportion to the profits but also to bear one-eighth of the loss, the Court of King's Bench seemed to think it a partnership; (*l*) and indeed this distinction between a partner, and an agent remunerated in proportion to the profits, and whose income will consequently fluctuate with their fluctuation, is not very easy to apply, and Lord Eldon has lamented its excessive nicety. (*m*)

It is almost needless to observe, that in every question respecting the contract of partnership, if the legislature have dictated no particular course, and the law adopted no peculiar regulation founded on the nature of the subject, we must be guided by those principles which govern contracts in general. Thus each of the parties to it must be competent, and therefore the contract of partnership, if attempted to be concluded by an infant, will be voidable at his full age, (*o*) and void if by a *fême coverte*, (*p*) or alien enemy. So, if the undertaking be illegal, the contract upon ordinary principles

Ib. 331. *Hesketh v. Blanchard*, 4 East, 144. and see *Witherington v. Herring*, 3 M. & P. 30. *Geddes v. Wallace*, 2 Bligh, 270. Sed vid. *Exp. Rowlandson*, 1 Rose, 91. *Exp. Langdale*, 18 Ves. 300. *Exp. Watson*, 19 Ves. 459.

(*k*) *Benjamin v. Porteus*, 2 II. Bl. 590.

(*l*) *Smith v. Watson*, 2 B. & C. 401. and see *Exp. Rowlandson*, 1 Rose 91.

(*m*) *Exp. Hamper*, 17 Ves. 404.

(*o*) *Holmes v. Blogg*, 1 Moore, 466. 8 Taunt. 35. & 508. *Warwick v. Bruce*, 2 M. & S. 205. *Corpe v. Overton*, 10

Bingh. 252. He must elect to avoid within a reasonable time after his full age, and give notice thereof to the world, otherwise he will be liable on partnership contracts made after his attaining twenty-one. *Goode v. Harrison*, 5 B. & A. 150. But not on those made during his non-age, unless he confirm them after his full age in writing. St. 9 G. 4. c. 14. sect. 5.

(*p*) But semble that a *fême coverte*, trading as she may do by the custom of the city of London, may be a partner. *Beard v. Webb*, 2 B. & P. 93.

of law is void, and that whether it be to do a thing, improper in itself, or rendered so by the positive prohibition of the legislature; (*q*) for “where a contract which a party seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no court will lend its assistance to give it effect.” (*r*)

Though partnership is, as between the partners themselves, the result of a contract, yet a man may, without entering into any contract, impose upon himself the liabilities of a partner with regard to third persons; for the law of England is, that he who lends his name and credit to a firm, and, as the phrase is, holds himself out to the world as a partner therein, is liable for its engagements; and that whether he have any real interest in the firm or no, for it would be highly prejudicial to commerce to allow a wealthy man, by the loan of his name, to give other persons a fictitious credit in the world, and then refuse to satisfy creditors who had made their advances upon the faith of his apparent responsibility. (*s*) Such a man is usually called a *nominal partner*. And it has been said to make no difference in his liability, that the creditor of the firm who seeks to charge him was not aware of such holding out at the time that he made his advance. (*t*) In order to fix a person with responsibility of this description, no particular mode of holding himself out to the world as a partner is required. If he do acts, no matter of what kind, sufficient to

(*q*) *Aubert v. Maze*, 2 B. & P. 571. *Mitchell v. Cockburn*, 2 H. Bl. 397. *Booth v. Hodson*, 6 T. R. 405. *De Begnis v. Armistead*, 10 Bing. 111. *Duvergier v. Fellowes*, 10 B. & C. 826.

(*r*) Per Ld. Tenterden, in *Wetherell v. Jones*, 3 B. & Adol. 223.

(*s*) *Guidon v. Robson*, 2 Camp. 302. *Waugh v. Carver*, 2 H. Bl. 235.

(*t*) *Young v. Axtel*, cited 2 H. Bl. 242. The justice of this rule is question-

able, and the expressions of Mr. J. Parke in *Dickenson v. Valpy*, 10 B. & C. 140. are opposed to it. His Lordship says, “If it could have been proved that the defendant had held himself out to be a partner, not *to the world*, for that is a loose expression, but *to the plaintiff himself*, or under such circumstances of publicity as to satisfy a jury that the plaintiff *knew of it and believed him to be a partner*, he would be liable, &c.

induce others to believe that he is a partner, he will be chargeable as such ; *ex gr.* if he accept bills drawn on the firm, (*u*) or describe himself as having a joint interest in its property. (*w*) But a man who describes himself as partner with another in a particular kind of transaction, *ex. gr.* in discounting bills, does not thereby hold himself out as his general partner in any other business which he may happen to profess ; (*x*) and if the acts relied on as constituting a holding out were done without the knowledge or default of the person thereby represented as a partner, or if it can be proved that the party seeking to charge him had notice of the real circumstances of the case, he will not be answerable. (*y*)

But a person holding himself out to the world in the manner above described, though he may, for the benefit of others, be treated as a partner, is not, properly speaking, such ; for partnership is, as we have seen, the result of a particular species of contract, into which he has never entered.

We will now therefore proceed to enquire, *first*, how this contract of partnership may be formed ; *secondly*, how it may be dissolved. We will afterwards consider what are the rights and liabilities of partners as between themselves, and what as between them and third persons ; and will conclude with a few observations on that peculiar species of partnership, intituled a joint stock company.

(*u*) *Spencer v. Billing*, 3 Camp. 310.
See 10 B. & C. 140.

(*w*) *Parker v. Barker*, 1 B. & B. 9.
3 Moore, 226. See also *Goode v. Har-*
rison, 5 B. & C. 150. *Swan v. Steele*,
7 East, 210.

(*x*) *De Berkomp v. Smith*, 1 Esp. 29.

(*y*) *Fox v. Clifton*, 6 Bingh. 776.

9 Bing. 118. *Alderson v. Pope*, 1 Camp.
405. n. *Minnet v. Whinney*, 5 Bro. P. C.
489.

SECTION II.—*How formed.*

It must be formed by the intervention of all the persons to be bound by it; one partner may, as we shall see, bind another for many purposes without his knowledge, but there must be consent of every individual member of the firm to authorise the introduction of a new one; (z) so necessary is this consent, that the executors of a deceased partner are not allowed to occupy his place, (a) unless there be a stipulation in the contract of partnership, that they shall do so, in which case *modus et conventio vincunt legem*. But if there be any thing in the very nature and constitution of the partnership, which renders it impossible that the members could have expected, or intended, the consent of the whole body, to be applied for upon the occasion of each change; as where a company was to be formed with a capital, divided into 12,000 shares; and scrip receipts were given to the intended shareholders, which receipts were publicly sold to strangers; and any persons producing them and paying a second instalment on their shares, were allowed to execute the deed of partnership, so that the power of transferring scrip to any one could not but have formed part of the original design: such a case would not, it seems, be governed by the rule which restrains partners from parting with their shares in ordinary cases, without each other's consent. (b) Respecting the formation of the contract, it need only further be observed, that it is not one of those which the law requires to be in writing, and may therefore either be concluded by mere words, or inferred from the acts of the parties. (c)

(z) Exp. Barrow, 2 Rose 255., and
see M'Neill v. Reid, 9 Bingham 71.

(b) Fox v. Clifton, 9 Bingham 120.

(c) Peacock v. Peacock, 16 Ves. 49.

(a) Pearce v. Chamberlain, 2 Ves.

Alderson v. Clay, 1 Stark. 405.

SECTION III.—*How dissolved.*

Let us next see how the contract of partnership may be *dissolved*. It often happens, that at the time of its formation the parties expressly agree, that it shall endure but for a stated period; there may also happen cases, in which, though there be no express provision, an implied contract as to its duration may arise: for instance, partners may purchase leasehold interests of such a description, as to raise a fair presumption that they intended to continue the partnership as long as those leases should endure. *(d)* If a limit to the term of partnership be thus prefixed, the contract will of course dissolve on its arrival. It may likewise be dissolved at any time by mutual consent, and courts of equity have power to put an end to it by their decree, a power which they will exercise in case the partnership undertaking turn out impracticable, *(e)* or one of the partners become an incurable lunatic, *(f)* or is guilty of gross misconduct, such as refusing to account for his receipts, or to submit his dealings to the examination of his companions. *(g)* If no limit was originally fixed, it is called a *partnership at will*, and may be dissolved at the individual pleasure of either party, at even a moment's notice. *(h)* In all cases it is dissolved by the bankruptcy of any one of the partners, followed by adjudication *(i)* by his outlawry, or attainder of treason or felony, for the first of these disqualifies him for the duties of a partner, and the

(d) See *Crawshay v. Maule*, 1 Swanst. 521.

(e) *Baring v. Dix*, 1 Cox. 212. See *Waters v. Taylor*, 2 V. and. B. 299.

(f) *Ibid.* *Sayer v. Bennet*, Mont. Part. Vol. i. Append. 18.

(g) See *Goodman v. Whitcombe*, 1 Jac. & Walk. 592. *Chapman v. Beach*, *ibid.* 594. *Marshal v. Colman*, 2 Jac. &

Walk. 200.

(h) *Nerot v. Burnand*, 4 Russ. 260. *Peacock v. Peacock*, 16 Ves. 50. *Featherstonhaugh v. Fenwick*, 17 Ves. 298. and per Parke J. *Heath v. Evans*, 4 B. & Adol. 175.

(i) *Fox v. Hanbury*, Cowp. 445. *Exp. Smith*, 5 Ves. 295.

others strip him of all civil capacity. It would also probably be held, that a sale of the common stock under a separate execution against one of the partners, would be a dissolution of the partnership: (k) it would seem, that it ought at least to be so at the election of his companion, upon the common principle, that where one contractor disables himself by his own act, from the performance of his part of the contract, the other may treat him as having agreed to rescind it. (l) The death of one of the partners operates of course as a dissolution, since we have seen that his executors cannot represent him; and so will the marriage of a female partner, since her husband would otherwise be introduced into the firm without the consent of her copartners. (m)

Whenever any of the above circumstances happen, the entire firm, though it consist of never so many, is dissolved, unless the contrary have been in express terms provided for, (n) though the remaining partners may of course come to a new agreement, to carry on the business upon the old terms.

The above are the modes in which a partnership may be determined, *as between the partners themselves*; for those who desire to end it *as to strangers*, should give notice to the world of its dissolution, otherwise they hold themselves out as being still in conjunction with their late partners, and will continue to be bound by their engagements. (o) The mode of giving this notice will be hereafter described, when we come to speak of the time at which the liability of partners to third persons determines.

(k) *Waters v. Taylor*, 2 V. & B. 517. n.
300.

(l) See *Planche v. Colburn*, 8 Bingh. 14. *Robson & Sharpe v. Drummond*, 2 B. & Ad. 307. *Withers v. Reynolds*, 2 B. & Ad. 882.

(m) See *Nerot v. Burnand*, 4 Russ. 260. *Wrexham v. Huddleston*, 1 Swanst.

(n) *Crawshay v. Collins*, 15 Ves. 228. *Kinder v. Taylor*, Gow Part. 240. *Crawshay v. Maule*, 1 Swanst. 509. in notis.

(o) *Parkin v. Carruthers*, 3 Esp. 248. *Graham v. Hope*, Peake 154.

SECTION IV.—*Rights and Liabilities of Partners among themselves.*

It was proposed to consider in the third place, the rights of partners against, and their liabilities to, one another.

They have a joint interest (*p*) in the partnership stock and effects, subject to the application of a maxim, which will hereafter be discussed, viz. "*Jus accrescendi inter mercatores locum non habet.*" (*q*) But equity, which exercises a peculiar jurisdiction over the accounts of partners, looks on the right of each in the joint stock, as subject to the state of those accounts; so that between himself and his companions, his valuable interest may amount to little or nothing, nay, he may be indebted to the concern of which he is a member; for it is to be observed, that a partnership is held in equity, so far distinct from the individuals composing it, that each of them may buy or borrow from the firm, and the firm from him, *vice versâ*, and although each partner acting as such, can, as we shall hereafter see, bind the joint stock, by dealing with strangers in the name of the firm, yet he cannot do so by any act on his own individual account to a larger extent than his own interest. Thus, though the goods may be taken, and *his share* therein sold for his own private debt; yet the purchaser from the sheriff buys only that to which the defendant is (as between himself and his companions), justly entitled, (*r*) and the rule is the same if he become individually a bankrupt. (*s*)

(*p*) In the absence of agreement, a partner's right seems like that of other joint-owners; if there be two, an undivided moiety; if three, a third, and so on. A contrary doctrine was once acted on at N. P., *Peacock v. Peacock*, 2 Camp. 45. and see S. C. 16 Ves. 49., but has been since disapproved of by high authority. See 16 Ves. 56.

(*q*) Vide Book 2.

(*r*) *Heydon v. Heydon*, 3 Salk. 392. *Chapman v. Koops*, 3 B. & P. 289.

(*s*) *West v. Skip*, 1 Ves. 242. *Holderness v. Shackles*, 8 B. & C. 612. There are several peculiar rules adapted to the case of a bankrupt partner; these will be treated of in the Fourth Book, under the head of Bankruptcy.

To ascertain each partner's share in the joint stock, it is primarily important to know what property is comprehended within that denomination. Now, it by no means follows, that because property has been used or risked for the service of the firm, it is therefore partnership property, it may be the sole property of any one of the partners: thus, if A. being the owner of a parcel of goods, propose to B. that they should exert themselves jointly in selling them, and divide the profit; B., although a partner in the profits, is not so in the goods, nor are they any part of the joint stock, but the sole property of A., risked by him for the service of the partnership.^(t) But still partnerships may and do exist, in which all the capital is contributed by one, and nothing but his labour by the other; who, notwithstanding, is entitled to consider the capital as joint stock, and claim an equal share of it or its produce.^(u) The law in all these cases moulds itself to the intention of the parties when that can be ascertained, and is conformable in this respect to the doctrine laid down by continental jurists.^(w)

In the conduct of partners towards each other, the most scrupulous fidelity must be observed, and its observance is enforced by courts of equity. Thus, one is not allowed to stipulate for any private advantage at the expense of the rest; if he do, he will be prevented from enjoying it, or compelled to hold it as a trustee for their benefit.^(x) "It is clear," said Sir William Grant, M. R., "that one partner cannot treat privately, and behind the backs of his copartners, for a lease of the premises where the joint trade is carried on; if he do so, and obtains a lease in his own name, it is a trust for the partnership."^(y) Nay, a partner must not place himself

(t) *Smith v. Watson*, 2 B. & C. 401.
Meyer v. Sharpe, 5 Taunt. 74. See *Exp. Hamper*, 17 Ves. 404.

(u) *Reid v. Hollinshed*, 4 B. & C. 867.

(w) See *Pothier Contrat. de Societé*, cap. 2. sect. 1.

(x) *Russell v. Austwick*, 1 Sim. 52.
Maddeford v. Austwick, *ibid.* 89. and see *Somerville v. Mackay*, 16 Ves. 382.
Fawcett v. Whitehouse, 1 Russ. & Mylne, 132.

(y) *Featherstonhaugh v. Fenwick*, 17 Ves. 298. 2 Hov. Suppl. 478.

in a situation likely to give him an interest, or even a bias against the discharge of his duty ;(z) all which results from that broad principle of equity, that from every person standing in a situation of trust and confidence with respect to another, a conduct marked with the most scrupulous good faith shall be required, and it is almost superfluous to observe, that in the case of partnership, *good faith* dictates not merely abstinence from all deceit and injury, but zealous co-operation in the objects of the concern, honourable exactness in keeping accounts, and readiness to submit them to inspection ; and surely, considering that each partner is the accredited agent of the rest, and has power to bind them to all contracts within the scope of the joint trade, no one can blame the strictness with which this *good faith* is required by courts of equity, which will even declare the partnership dissolved, in case of any very flagrant breach thereof. This is however done with great reluctance, and the contract of partnership has been, not unaptly, compared by an eminent judge, to that of marriage ; since the parties to each take one another for better and for worse, and must not call at every turn upon the law, to rectify the consequence of their own want of foresight.

It has been already observed, that a partnership is often contracted in writing ; such an agreement usually goes by the name of Articles of Partnership ; where these exist, they must of course, as far as they will go, be acted on, for *modus et conventio vincunt legem* : their terms however are explained, and their deficiencies supplied by reference to the above principles, which they themselves indeed, in many parts, do little other than express.(a) They generally point out the objects of the partnership, the time at which it is to commence, which, if no other be specified, is from the date of the articles ;(b) that at

(z) *Glassington v. Thwaites*, 1 Sim. & Stu. 133. *Burton v. Wookey*, 6 Madd. 367.

(a) See on Partnership Articles, Jar-

man's Conveyancing, Vol. 7.

(b) *Williams v. Jones*, 5 B. & C. 108.

which it is to end, the amount of capital, and the proportions in which it is to be advanced by, and in which the profits of the trade are to be distributed among, the partners, who stipulate therein for the due performance of their respective duties. It is sometimes also provided, that differences among them shall be ended by the vote of the majority, and almost always, that an account shall be taken annually of the debts and effects of the partnership, and a particular mode of winding up affairs pursued upon its dissolution, in general, either by turning all the effects into money, and dividing them, which is the course pursued by courts of equity, if there be no stipulation on the subject, or by the transfer of one partner's share to the other, at a valuation. Sometimes also it is agreed, that the executor, or other person appointed in the will of a partner, shall succeed him. Where there is such a clause, its general effect appears to be to give the executor or appointee, his option, whether he will remain a member of the firm, or have its affairs wound up, and his share ascertained and paid to him. (c) And he will be entitled to a reasonable time, and an inspection of the partnership accounts to assist him in his election. (d) Yet upon principle it seems, and probably would be decided, that where it is clear that the testator intended him to have no option, he must either conform and carry on the trade, or relinquish his claim to any benefit under the will appointing him; (e) and it behoves him to consider very warily, for if he once become a member of the firm, though but in trust for others, he will be liable like any other partner for its engagements, both in person and property, and may even become bankrupt. (f) It has been usual to stipulate, that disputes between partners shall be referred to arbitration, but whether this can be enforced, has been much

(c) *Kershaw v. Matthews*, 1 Russ. 361. 2 Russ. 62.

(d) *Pigott v. Bayley*, M'Clell. & Younge 569.

(e) See Lord Eldon's observations in *Crawshay v. Maule*, 1 Swanst. 512.

(f) *Wightman v. Townroe*, 1 M. & S. 412. Exp. *Richardson*, Buck. 202.

questioned; for it is said, that courts of law will not allow their jurisdiction to be ousted by any such private arrangement; (g) and equity will not decree a specific performance thereof. (h) Lord Eldon has suggested, that where such a covenant is inserted, liquidated damages for its breach should also be agreed on: since otherwise, a court of law, even if it would entertain the action, might find difficulty in awarding more than a nominal sum to the plaintiff; for perhaps he would have failed before the arbitrators, had they been appointed. (i)

It only remains to observe, that equity, in construing these instruments, looks mainly to the intention of the parties as evidenced by their conduct, and if it find that some of the provisions have been purposely and uniformly disregarded, will even consider them totally dispensed with. "There would," said Lord Eldon, in the case of *Jackson v. Sedgwick*, (k) "be no difficulty in applying the articles to the particular business, with reference to which they were framed. But if the parties engaged in business, in which their application would work injustice, then I say, that these articles, though they contain a general reference to other business, are not such as would have been prepared with relation to that specific business, and that engaging in that business affords a reason for not performing the stipulations."

Our last enquiry under this head, is as to the mode in which the mutual rights of copartners may be enforced and vindicated, an object which must of course be effected in general, by application to some court of law or equity.

As to the remedy *at law*. If there be a covenant by deed for the performance of the duty neglected, an action may be brought upon such covenant. (l) If there be not a deed,

(g) *Kill v. Hollister*, 1 Wils. 129.
See *Tattersall v. Groote*, 2 B. & P. 131.

(h) *Price v. Williams*, 6 Ves. 818.
Agar v. Macklew, 2 Sim. & Stu. 418.

(i) See *Street v. Rigby*, 6 Ves. 815.

(k) 1 Swanst. 460. 1 J. Wil. 297.

(l) *Want v. Reece*, 1 Bingh. 18.

assumpsit may be maintained by a partner, for cash which he advanced to his copartner before the partnership, and in order to its formation ;(*m*) or which he has paid since its dissolution to a stranger, who had not due notice of that event, and to whom therefore his late partner was able to render him liable, though he had no interest in the dealing whereby such liability accrued to him.(*n*) Where an account has been taken and a balance struck, a partner may sue at law for what appears to be due to him on such balance from his companion ; and that whether the account was taken by the parties themselves, or through the medium of a court, or of an arbitrator :(*o*) and though it has been laid down, that an express promise to pay such balance, must be proved, in order to sustain the action,(*p*) yet Gibbs, C. J., has decided for the sufficiency of an implied one.(*q*) It seems also, that a single item may be so separated from the joint account, as to entitle one partner to sue at law for it against another ;(*r*) it is held that he may maintain an action on the note or acceptance of his companion,(*s*) though for value received on the partnership account ; and it has been said, that one partner who hath been sued, and obliged to pay damages incurred by the whole firm, may maintain an action against the rest for contribution.(*t*) But this is denied, excepting where the partnership is only in an isolated transaction.(*u*)

(*m*) *Venning v. Leckie*, 13 East. 7.

1 Stark. 78.

(*n*) *Osborne v. Harper*, 5 East. 225.

(*s*) *Preston v. Strutton*, 1 Anst. 50.,

Hutton v. Eyre, 1 Marsh. 603.

see 4 Bingham. 151.

(*o*) *Moravia v. Levi*, 2 T. R. 483. n.

(*t*) See *Abbott v. Smith*, 2 Bl. 947.

Foster v. Allanson, *ibid.* 479. *Winter v.*

Woolley v. Batte, 2 Carr. & P. 417.

White, 1 B. & B. 350. See *Henley v.*

(*u*) See *Gow on Part.* 3d Edit. p.

Soper, 8 B. & C. 16.

79. The following note has been communicated to me by the kindness of a learned friend, Mr. Hodges :—

(*p*) *Fromont v. Coupland*, 2 Bingham. 170. 9 B. M. 319.

(*q*) *Rackstraw v. Imber*, Holt. N. P. C. 368.

Sadler v. Hickson, K. B. Hil. 1834.

(*r*) *Coffey v. Brian*, 10 B. M. 341.

The plaintiff and defendant having been partners, and judgment having been obtained against them for a partnership

3 Bingham. 54., but see *Robson v. Curtis*,

For the general rule of law is, that between partners, whether they are so in general, or for a particular transaction only, no account can be taken at law, *(w)* nor action maintained for work and labour, or money expended on account of the partnership; the reason for which seems to be, that a court of law could not in such cases do *complete* justice, since the forms of an action would not permit it to enter on such an investigation of the entire state of the partnership accounts as would be necessary, in order to ascertain the fair and real claims of the contending parties.

As to the remedy in *Courts of Equity*.—If there be so flagrant a violation of any covenant contained in Articles of Partnership, as to call for a dissolution of the entire contract, equity will, as we have seen, enforce that dissolution by its decree; but where there is a covenant, and therefore a remedy at law, it has a strong disinclination to interfere in any case of less importance. *(x)* Unless perhaps, under circumstances of peculiar aggravation and hardship; *(y)* especially if the remedy at law were inadequate to compensate the party injured, for then one of the ordinary grounds of equitable jurisdiction would exist.

As courts of law cannot examine the accounts of partners among themselves, it follows that courts of equity will do so, for otherwise there would be a defect of justice. But whether one partner can file a bill against another, praying for an account, without a dissolution of the partnership, has been questioned. Lord Eldon seems to have thought, and the Vice-Chancellor has lately decided, that he could not; *(z)* but

debt, the plaintiff under pressure of an execution paid the whole amount, and brought this action for contribution. The Court held that it was unsustainable.

(w) See *Bovill v. Hammond*, 6 B. & C. 149. Accord. *Holmes v. Higgins*, 1 B. & C. 74.

(x) *Marshall v. Colman*, 2 Jac. & W. 266.

(y) *Ibid.*

(z) *Forman v. Homfray*, 2 Ves. and Bea. 329. *Loscombe v. Russell*, 4 Simon, 10.

Sir John Leach has expressed a contrary opinion, (a) nor does this point seem of much practical importance, for it is hard to imagine how the interference of a Court in the accounts, can become necessary, without such gross misconduct as would render a termination of the partnership itself desirable.

On taking this account, the Court has power to order a sale of the partnership effects and a division of the produce, (b) in the proportion to which it considers each partner entitled; in fixing which it takes into consideration, not merely the balance upon all transactions completed at the period of the dissolution, but also such as were at that time pending, and from which profit or loss hath since resulted. (c) Nay, if one partner die, or become bankrupt, which we have seen, causes the immediate dissolution of the concern, and the remaining partners continue to trade with the joint stock, the representatives of their late partner will be entitled to a portion of the profits, since his property was made use of in order to acquire them, and thus exposed to the risks of bankruptcy and insolvency. (d)

We have seen that in cases of misconduct, equity will sometimes interfere, by decreeing a dissolution of the partnership and restraining the offender from a repetition of his ill-behaviour by injunction. In some cases too, where one partner seeks to exclude another from that share of the concern to which he is entitled, the Court will appoint a receiver of the partnership stock, (e) but with reluctance, since such a step can scarce be taken without injury to the trade. (f)

(a) *Harrison v. Armitage*, 4 Madd. 143.

(b) *Crawshay v. Collins*, 15 Ves. 218. *Wilson v. Greenwood*, 1 Swanst. 471. *Featherstonhaugh v. Fenwick*, 17 Ves. 298.

(c) *Jackson v. Sedgewick*, 1 Swanst. 468.

(d) *Crawshay v. Collins*, 15 Ves. 218. 2 Russ. 325. See *Brown v. De Tastet*, Jac. 292.

(e) *Wilson v. Greenwood*, 1 Swanst. 471. *Peacock v. Peacock*, 16 Ves. 49.

(f) *Goodman v. Whitcombe*, 1 Jac. & Walk. 589. *Oliver v. Hamilton*, 2 Anst. 453.

SECTION V.—*Rights of third persons against partners.*

Next, as to the rights of third persons against the partnership. It is a general rule, that *each partner is the accredited agent of the rest, whether they be active, nominal, or dormant, and has authority as such to bind them, either by simple contracts, respecting the goods or business of the firm, or by negotiable instruments circulated in its behalf, to any person dealing bonâ fide.*(a)

Although it may have been agreed among themselves, that he shall have no such authority,(b) yet will they be bound, unless the party dealing with him have notice of the arrangement;(c) and in order to engage the firm, it is not necessary that all its members should be specified; for a partnership comprising several, as A. and B., and C., may carry on trade in the name of one, as A., or in the name of "A and C," or even in a fictitious name, or that of a mere stranger, and when any of these methods is adopted, the pledge of the partnership's name binds the whole firm;(d) nay, to such an extent is this rule carried, that where two firms have a common partner and a common name, each one can bind the other to the payment of negotiable securities, drawn, indorsed, or accepted in that common name.(e)

Let us examine the rule above laid down a little more minutely. I have said, that each partner may bind the rest *by simple contracts*, for he cannot *by deeds*, unless he have express authority *by deed* for that purpose,(f) not even though the contract of partnership were under seal, if it do not contain

(a) Vere v. Ashby, 10 B. & C. 296.
Bond v. Gibson, 1 Camp. 185. Wintle
v. Crowther, 1 Cr. & Jerv. 316.

(b) South Carolina Bank v. Case,
8 B. & C. 427.

(c) Minnett v. Whitney, 5 Bro. P. C.
489. Willis v. Dyson, 1 Stark. 164.

(d) Wintle v. Crowther, 1 C. & J.
316.

(e) Swan v. Steele, 7 East. 210. Ba-
ker v. Charlton, 1 Peake 80. See Lloyd
Ashby, 2 B. & Ad. 23.

(f) Harrison v. Jackson, 7 T. R.
207.

a specific power to that effect; (g) nor though the others afterwards acknowledge his authority; (h) and if he execute such instruments, he will himself be bound, though they will not. (i) These observations, however, apply to cases where the deed is in the nature of a grant; for it would seem that one partner can execute a valid *release* by deed in the name of the firm, and this distinction appears conformable to general principles of law. (k)

Moreover, the contract must be *respecting the partnership business*. "In partnerships, both partners are authorised to treat for each other in every thing which concerns, or properly belongs to, the joint trade, and will bind each other in transactions with every one who is not distinctly informed of any particular circumstances that may vary the case. On the other hand, when the transaction has no apparent relation to the partnership, then the presumption is the other way, and the partnership will not be bound by the act of one of the partners without special circumstances;" (l) thus, one of several partners may pledge the partnership name for money *bonâ fide* lent, the lender supposing that one partner has the authority of the house to borrow, and that he is borrowing for the purposes of the house. But if there be gross negligence, and the transaction be out of the ordinary course of business, the lender cannot recover against the other partners if the money be misapplied. Such is the general rule, but it is not easy to draw the line, and say what matters are and what are not sufficiently akin to the partnership business. "It has," said Abbott, L. C. J., "undoubtedly been held, that in a matter wholly unconnected with the partnership, one partner

(g) Ibid.

(h) *Steiglitz v. Eggington*, Holt N. P. C. 141.

(i) *Elliott v. Davis*, 2 B. & P. 338.

(k) See 1 Rolle. Abr. 410. *Perry v. Jackson*, 4 T. R. 519. *Hawkshaw v.*

Parkins, 2 Swanst. 544., and see *Arton v. Booth*, 4 Moore, 192. *Furneval v. Weston*, 7 Moore, 356.

(l) Per Eyre C. J. in *Exp. Agace*, 2 Cox 312.

cannot bind the other; but the true construction of the rule is this, that the act and assurance of one partner, made *with reference to business transacted by the firm*, will bind all the partners; (m) and in that case, a navy agent, whose business is not to deal in annuities, was held to bind his firm, by guaranteeing the payment of an annuity which he had purchased *for a customer*. On the other hand, one partner cannot it seems bind another by a submission to arbitration, and in that case, Best C. J. said, "We should be very tenacious of extending any further the liability of partners and joint contractors." (n)

Whatever may be the full extent of the protection afforded to copartners by this part of the rule, it follows from it at least, as an undoubted consequence, that they cannot be bound by any contract made with their partner as an individual, and on his own account, though he may afterwards impart to them the benefit which he himself derived from it; for such a contract is so far from respecting the business of the firm, that it does not even contemplate the existence of one. Thus, a several note or acceptance by, or a several loan to, one of a partnership, will never charge the rest, though their companion may have applied to the use of the firm, the money which he obtained by the discount or advance. (o) But it would be different, if the contracting partner were really empowered to treat, and did treat on account of the firm, while he described himself as treating in his individual capacity: in such a case, although the partnership could not be sued on any note or acceptance he might have given in his own name, in consequence of the rules of evidence and the several nature of the security; yet it is apprehended, that if the

(m) *Sandilands v. Marsh*, 2 B. & A. 673., and see *Hooper v. Lusby*, 4 Camp. 66.

(n) *Stead v. Salt*, 10 Moore 395.

(o) *Siffkin v. Walker*, 2 Camp. 308.

Emly v. Lye, 15 East. 7. *Lloyd v. Freshfield*, 2 C. & P. 325. *Smith v. Craven*, 1 Cr. & Jerv. 500. 1 Tyrwh. 389. *Bevan v. Lewis*, 1 Sim. 376.

transaction had been such as a loan of money or a purchase of goods, the creditor would have a right to charge the partnership, if he subsequently discovered the transaction to have been on its account, upon the common ground, that an unknown principal may be charged when discovered. (p) And further, that the very nature and consideration of the debt may be such as to raise a presumption, that it was incurred under the authority of the firm. Thus, if a member purchase goods, such as the firm deals in, and apply them when so purchased to its use, a strong presumption seems to arise, that he was dealing in its behalf; though had he borrowed money and contributed that to the firm, such a presumption might not have arisen. For when the firm desires a partner to procure goods, which they cannot but know he must obtain by purchase, the inference is, that they authorise him to purchase, and so contract through him with the vendor. (q) But when they call on him for a contribution of money, the inference is, that they intend to receive it from himself, not to empower him to borrow for them from a third person, and therefore in such a case where A. had lent money to B., who had advanced it to the firm of which he was a member, Lord Hardwicke said, "Here are plainly *two* contracts, one between A. and B., the other between B. and his partner." (r)

There is of course no doubt, that a third party may contract with the whole firm, and take the several bill, note, bond, or other obligation of a copartner as his collateral security. (s)

Provided the contract have a sufficient relation to the business of the firm, and the contractor have in other respects acted *bonâ fide*, it matters not much, what may be its description, or how grievous the contracting partner's fraud and

(p) See *Brown v. Gibbins*, 5 Bro. P. C. 491.

(q) See *Gouthwaite v. Duckworth*, 12 East. 421.

(r) *Exp. Hunter*. 1 Atk. 223. See *Exp. Emly*, 1 Rose 61.

(s) *Exp. Brown*, cited 1 Atk. 225. *Denton v. Rodie*, 3 Camp. 493.

misconduct: (t) thus the firm are liable, whether it be a loan to him for his expenses while engaged in the partnership business, (u) or a purchase of goods such as might be used therein, but which he instantly converts to his own benefit, (w) so they are bound by his sale, (x) or pledge (y) of the joint property. So, though a partner has no right to guarantee a separate transaction in the name of the rest, yet he may give a guaranty for his partner in a matter relating to the partnership; (z) and if they afterwards adopt and recognize his act, they will be bound, whether the guaranty related to the business of the firm or not. (a)

Again, one partner can bind the firm *by circulating negotiable instruments on its behalf*. This is quite clear, (b) and may be done as we have above seen, by negotiating them in the name, whatever that may be, in which the partnership trade is usually carried on. We may further remark, that if a bill be drawn upon the partnership in their usual style and firm, and accepted by one of the partners in his own name, it will bind them all; for he must be understood to accept the bill according the terms in which it is drawn. (c) It seems too, that a firm may use one distinct name for all other purposes, and another, that for instance of the managing partner, for the purpose of indorsing negotiable instruments. (d) When

(t) See Willett v. Chambers, Cowp. 814. Rapp v. Latham, 2 B. & A. 795.

(u) Rothwell v. Humphreys, 1 Esp. 406.

(w) Bond v. Gibson, 1 Camp. 185.

(x) Lambert's case, Godboldt, 244.

(y) Raba v. Ryland, Gow N. P. C. 132. Tupper v. Haythorn, ibid. 135. Reid v. Hollinshead, 4 B. & C. 867, in these cases the defendants were ignorant that they were dealing with a partner, but the decisions in all, proceeded on the ground, that the pledgor's right as partner was sufficient to sustain the pledge.

(z) Exp. Nolte, 2 Glyn. & Jam. 306.

(a) Ibid. Crawford v. Sterling, 4 Esp. 207. Payne v. Ives, 3 Dowl. & R. 664.

(b) Pinkney v. Hall, 3 Salk. 126. Harrison v. Jackson, 7 T. R. 207. Kenyon C. J. dix. Sutton v. Gregory, 2 Peake 150. Wintle v. Crowther, 1 C. & Jer. 316.

(c) Wells v. Masterman, 2 Esp. 731. Mason v. Rumsey, 1 Camp. 384. Dolman v. Orchard, 2 Carr. & Pay. 104.

(d) Williamson v. Johnson, 1 B. & C. 145.

the trade is carried on in the name of one partner, who also carries on a separate trade, a question will arise, whether in negotiating a bill or note, he meant to pledge the firm or himself only; this must be solved by extrinsic evidence, for *prima facie* he alone is liable. (e)

Further, these negotiable instruments must have been circulated *on behalf of the firm*. Now it is clear, that when the purposes of the firm do not require that its members should pass negotiable instruments, it is not very likely that such should be circulated *in its behalf*: in such cases, therefore the implied authority of a partner fails, and the firm will not be bound by his negotiation. Hence it hath been decided, that partners in a farming or mining concern have no such authority; (f) and from the observations of the judges in the case last cited, I think it may be collected; *First*, that partners in a trade, strictly mercantile, have an authority implied by law to bind each other in bills and notes. *Secondly*, that partners in some particular businesses, such as farming and mining have *prima facie* no such authority. *Thirdly*, that this presumption against their authority may be rebutted, by shewing, 1st, that the constitution and particular purposes of the firm are such, as to render it in their individual cases necessary, or 2dly, that though not necessary, it is in other similar cases usual, "for if it be necessary or usual, the law will imply it." (g)

Lastly. It is an essential portion of the rule that the person to whom the firm is to be bound should have dealt *bonâ fide*. If he who seeks to charge the firm was himself privy to a fraud, if he knew, or even if there were circumstances sufficient to induce a man of moderate discernment to believe, that the partner, with whom he contracted, had not authority to bind the rest, innocent members will not be allowed to suffer

(e) Exp. Bolitho, Buck. 100.

635. Dickenson v. Valpy, 10 B. & C. 139.

(f) Greenlade v. Dower, 7 B. & C.

(g) Per Littledale J. *ibid*.

by his wickedness or stupidity. "There is no doubt," said Lord Mansfield, "but that the act of every single partner in a transaction relating to the partnership binds all the others. But there is no general rule which may not be infected by covin, or such gross negligence as may amount or be equivalent to covin; for covin is defined to be a contrivance between two to defraud or cheat a third." (*h*) With respect to negotiable instruments given in the name of the firm, the rule is, that they cannot be enforced by any party who was guilty of fraud in receiving them, (*i*) or who took them from him, knowing that they had been so fraudulently received, or even without knowing it, unless he gave a valuable consideration for them. (*j*) But that they may be enforced by any one who obtained them for value, and without fraud, (*k*) or gave a valuable consideration for them without knowing that they had been fraudulently obtained. (*l*) However, though the fraud of one partner may be a good defence to an action against all, yet they cannot, it seems, institute an action in order to avoid it. Thus, where a partner has fraudulently given the bills and money of the firm for his own debt, they cannot bring trover for the one and assumpsit for the other, for in doing so, they would be obliged to join the fraudulent partner as a co-plaintiff. Their remedy therefore, in such case, lies in equity. (*m*)

It would seem that the unexplained fact, that a partnership's security has been received from one of the partners in discharge of a separate claim against himself, is a badge of fraud, or of such palpable negligence as amounts to fraud, (*n*)

(*h*) See *Hope v. Cust*, 1 East, 53.
Lloyd v. Freshfield, 2 C. & P. 325.
Smith v. Burridge, 4 Taunt. 684.

(*i*) *Arden v. Sharpe*, 2 Esp. 524.

(*j*) See *Heath v. Sansom*, 2 B. & Ad. 295.

(*k*) *Wintle v. Crowther*, 1 Cr. & Jerv. 316.

(*l*) *Swan v. Steele*, 7 East, 210.
Lacy v. Woolcott, 2 Dow. & Ry. 458.

(*m*) *Jones v. Yates*, 9 B. & C. 532.

(*n*) See *Hope v. Cust*, 1 East, 53.
Sheriff v. Wilks, 1 East, 48. *Green v. Deakin*, 2 Stark. 347.

which it is incumbent on the party who so took the security to remove, by shewing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so. (o) Yet Lord Ellenborough appears to have thought that, even in such a case, the onus of shewing want of authority in the single partner would lie upon the firm, if it were, from the nature of the transaction, possible for them to procure direct testimony to that effect. (p) At all events it seems clear that very slight evidence on the contrary side will be sufficient to impose such onus on them.

Unless the security was transferred *for a separate demand*, no such presumption as we have been speaking of arises, for if it be in the ordinary course of commercial transactions, as upon discount without any knowledge on the part of the transferee that it was a separate transaction, the firm will be bound though the transferring partner may have converted the whole produce of the security to his own use, (q) to hold the contrary would tend to shake all paper credit.

The transfer of a partnership security may be fraudulent in part, yet good for the residue; thus, where the defendant's partner was separately indebted to the plaintiff in the sum of 80*l.*, and gave him the acceptance of the firm for 130*l.* 10*s.* 6*d.* the Court of Exchequer held that though the plaintiff had no right to retain thereout his debt of 80*l.* yet he might keep a verdict which he had recovered for the residue and for the amount of another partnership acceptance, with respect to which no fraud was proved. (r)

It remains to observe that though a transaction may be *primâ facie* fraudulent against the firm, yet it will bind them

(o) See Sir J. Leach's observations in *Frankland v. M'Gusty*, Knapp, Priv. C. C. 274. and Lord Eldon's in *Exp. Bonbonus*, 8 Ves. 540.

(p) *Ridley v. Taylor*, 13 East, 178.

See *Exp. Kirby*, Buck. 511. *Wintle v. Crowther*, 1 Cr. & Jerv. 316.

(q) *Exp. Bonbonus*, 8 Ves. 540.

(r) *Wintle v. Crowther*, 1 Cr. & Jerv.

316.

if they subsequently approve of it, for subsequent approbation raises an inference of previous positive authority. (s)

Besides the cases mentioned in the rule above laid down, the firm may, in various other ways, be bound by the conduct of a partner. Thus his admission, acknowledgment, or representation, is evidence against them; (t) and part payment of principal or interest by one of several partners is, even since St. 9. G. 4. c. 14., an answer to the statute of limitations as to all; (u) but since that act no other species of acknowledgment by a co-partner is so. Notice by (w) or to (x) one partner, is equivalent to notice by, or to, all. Moreover as he is the accredited agent of the rest, it follows upon grounds, which we will examine more deliberately in Chapter III, that they are liable for tortious acts committed in such his capacity, whereby other persons are injured, as for his conversion of a customer's money; (y) nay, they have been held responsible for breaches of the revenue laws committed by him in his management of the partnership business; (z) and may even, in some cases, be made criminally answerable for him. (a)

The liability of each partner to third persons, in respect of

(s) *Exp. Bonbonus*, 8 Ves. 540. See *Exp. Nolte*, 2 Glyn. & Jam. 306. *Crawford v. Sterling*, 4 Esp. 207. *Payne v. Ives*, 3 D. & R. 664.

(t) *Rapp v. Latham*, 2 B. & A. 795. *Wood v. Braddick*, 1 Taunt. 104, *Pritchard v. Draper*, 1 Russ. & Myl. 199. *Cheap v. Cramond*, 4 B. & A. 663. *Lacy v. McNeill*, 4 D. & R. 7.

(u) *Wyatt v. Hodson*, 8 Bingh. 309.

(w) *Mayhew v. Eames*, 1 C. & P. 550. *Hunt v. R. E. A. Co.* 1 M. & S. 47.

(x) *Alderson v. Pope*, 1 Camp. 404. *Porthouse v. Parker*, 1 Camp. 82. *Perry v. Jackson*, 4 T. R. 516. *Heath v. San-*

som, 2 B. & Ad. 295.

(y) *Stone v. Marsh*, 6 B. & C. 551. *Ry. & Moo.* 364. See *Moreton v. Harderne*, 4 B. & C. 223. *Nicholl v. Glen-*

nie, 1 M. & S. 558. (z) *Att. Gen. v. Stanniforth* Bunb. 97. *Att. Gen. v. Weeks*, *ibid.* 223. *Att. Gen. v. Burges*, *ibid.* See *King v. Manning*, *Comyn.* 616. *Att. Gen. v. Siddon*, 1 Tyrwh. 41. *Att. Gen. v. Riddell*, 2 Tyrwh. 523.

(a) *R. v. Almon*, 5 Burr. 2686. *R. v. Pearce*, *Peake*, 75. *R. v. Topham*, 4 T. R. 126. *R. v. Gutch*, 1 M. & M. 437. See further on this subject *post cap. 3. sect. 4.*

the engagements of the others, commences with the commencement of his partnership. He is not liable for contracts previously made. (b) If, indeed, after his accession to the partnership, he receive benefit from them, and recognize their existence, he will become responsible by virtue of a new contract to the same effect as the old one, which his conduct will be evidence of his having entered into along with his partners. (c)

His liability ceases upon his dissolving the partnership, removing his name from the firm, and giving proper notice of the dissolution, (d) for until the world is duly advertised thereof, he continues, as we have before remarked, to hold himself out as still in business with his late companions, and will be still responsible for their engagements; (e) and if he do not remove his name from the firm, he gives strangers cause to disbelieve his notice, though he may have promulgated one, and will therefore, notwithstanding it, continue liable. (f) But then this non-removal must, to produce this effect, be the result of his own negligence, for if his late partners wrongfully persevere in using his name that will not bind him. (g)

As to the mode of giving notice of the dissolution. To per-

(b) *Catt v. Howard*, 3 Stark. 5. *Vere v. Ashby*, 10 B. & C. 288. *Young v. Hunter*, 5 Taunt. 482. *Saville v. Robertson*, 4 T. R. 720. and *Fox v. Clifton*, 6 Bingh. 776. and *Dickenson v. Valpy*, 10 B. & C. 142. *ubi per Parke, J.* "If a person agree to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individual until all those conditions are performed. If any of the intended partners in the mean time enter into contracts, he is not bound by them,

on the simple ground that he never authorised them, always supposing that he has not held himself out directly or indirectly as having given such authority."

(c) *Exp. Jackson*, 1 Ves. 131. *Exp. Peele*, 6 Ves. 602. *Helsby v. Mears*, 5 B. & C. 504.

(d) On the question what amounts to dissolution, see ante sect. 3 and *Heath v. Sansom*, 4 B. & Ad. 177.

(e) *Parkin v. Carruthers*, 3 Esp. 248. *Graham v. Hope*, 1 Peake, 154.

(f) *Williams v. Keats*, 2 Stark. 290. *Dolman v. Orchard*, 2 Car. & P. 106.

(g) *Newsome v. Coles*, 2 Camp. 617.

sons who have not dealt with the firm, notice in the Gazette will be sufficient. (*h*) To persons to have so dealt express notice ought to be given; this is usually done by circular letters. (*i*) But if a fair presumption can be raised from other circumstances, that the party had actual notice, that will be enough. (*k*) Thus a change in the wording of checks has been held notice to a creditor who uses them. (*l*)

As to a dormant partner, as his name never appeared in the firm, of course it cannot be removed therefrom; and as the correspondents of the house never knew him to be a partner, it is held that they need not be informed of his ceasing to be such; (*m*) nay, though many may have been aware that he was a partner, yet will he not be chargeable, except by individuals who knew it at the time of entering into their engagements with the firm; (*n*) to such persons he will, if he have not given a proper notice of retirement. (*o*)

On his dissolving the partnership, removing his name from the firm, and duly promulgating notice of his withdrawal, all danger of his liability for the *future* acts of his companions is at an end; (*p*) and Lord Kenyon has even doubted whether a bill, indorsed by one partner in the name of the firm before dissolution, could be negociated afterwards. (*q*)

He, however, of course remains liable for contracts made by the firm while he continued to belong to it, yet, if the partnership be dissolved in consequence of his death, his personal representative stands in a very different situation, for he is completely exonerated from responsibility at law; the rule there being, that personal claims and liabilities survive. Equity,

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| (<i>h</i>) Godfrey <i>v.</i> Turnbull, 1 Esp. 371. | Heath <i>v.</i> Sansom, 4 B. & Adol. 177. |
| Wrightson <i>v.</i> Pullan, 1 Stark. 375. | (<i>n</i>) Carter <i>v.</i> Whalley, 1 B. & Ad. 11. |
| (<i>i</i>) Newsome <i>v.</i> Coles, 2 Camp. 617. | (<i>o</i>) Evans <i>v.</i> Drummond, 4 Esp. 89. |
| Jenkins <i>v.</i> Blizzard, 1 Stark. 418. | (<i>p</i>) Pinder <i>v.</i> Wilks, 5 Taunt. 612. |
| (<i>k</i>) M'Iver <i>v.</i> Humble, 16 East, 169. | Abel <i>v.</i> Sutton, 3 Esp. 108. Wright- |
| (<i>l</i>) Barfoot <i>v.</i> Goodall, 3 Camp. 147. | son <i>v.</i> Pullan, 1 Stark. 375. Heath <i>v.</i> |
| (<i>m</i>) Evans <i>v.</i> Drummond, 4 Esp. 89. | Sansom, 4 B. & Ad. 177. |
| Brooke <i>v.</i> Enderby, 2 B. & B. 71. See | (<i>q</i>) Abel <i>v.</i> Sutton, 3 Esp. 108. |

however, unwilling that this maxim should work injustice, considers the estate of the deceased partner as liable to the demands of the partnership creditors, until the debts which affected him at the time of his decease have been fully discharged. (r) Whether, indeed, the claim of the partnership creditors on the *separate* estate of the deceased shall be postponed to that of his own separate creditors, or whether they shall come in with them *pari passu*, or whether, lastly, they have any claim against it at all, until the insolvency of the partnership estate has been ascertained, are questions which seem not even yet finally settled. (s) But of this general rule there is no doubt, viz. that the separate estate of the deceased can never be discharged while any partnership debt remains outstanding. Nay, courts of equity will even reform joint securities, when executed by partners for a partnership debt, by construing them joint and several, so as to bind the executor of a deceased co-partner. (t) But such an instrument must have arisen out of some antecedent partnership liability, for a presumption then arises that, as the demand for which the security was given might have been enforced against the estate of a deceased partner, the parties must have intended that the security should be similarly available. But where the instrument is pure matter of arbitrary convention growing out of no such antecedent liability, that presumption does not arise, and then even a court of equity will not, if it be jointly worded, construe it joint and several, but will, like a court of law, measure its extent by the terms in which it is conceived. (u)

However, the liability of a retired partner and that of a

(r) *Vulliamy v. Noble*, 3 Meriv. 593.

(s) See *Gray v. Chiswell*, 9 Ves. 118. *Exp. Kendall*, 17 Ves. 519. *Campbell v. Mullett*, 2 Swanst. 576. *Devaynes v. Noble*, 1 Meriv. 529. *Cowell v. Sykes*, 2 Russ. 191. The better opinion seems

to be that the joint creditors must be postponed to the separate.

(t) *Burn v. Burn*, 3 Ves. 573. *Orr v. Chase*, 1 Meriv. 729.

(u) *Sumner v. Powell*, 2 Meriv. 30.

deceased partner's estate will be reduced by the amount of all payments (*w*) made by his late companions since the dissolution of the partnership, and appropriated, either specifically or impliedly, to the reduction of the demands upon the firm. Thus, Devaynes and others were in partnership as bankers, Clayton had a running account with the firm, and was in the habit of paying in and drawing out money. At the time of Devaynes' death, there was a balance in favour of Clayton and against the firm of 1713*l*. After the death of Devaynes, his late partners became bankrupt, but before their bankruptcy, Clayton had drawn out sums to more than the amount of 1713*l*., and had paid in other sums yet more considerable. Upon the bankruptcy of the surviving partners, Clayton was desirous of having recourse to the estate of Devaynes; but it was held that the sums drawn out by Clayton since the death must be appropriated to the payment of the balance of 1713*l*. then due, and that as the total amount of those sums was greater than the balance, the debt due from the firm at the death of Devaynes had been discharged and his estate exonerated; the sums paid in by Clayton since the death, constituting a new debt, for which the survivors only could be held liable. (*x*)

Although, among themselves, partners may, and often do, agree, that after the dissolution, the credits of the firm shall be received, and its debts paid, by one of the late partners only, yet this arrangement does not effect their joint-responsibility to third persons, unless such persons agree to exchange the liability of the firm for that of the single partner. But neither acceptance of the single partner's note, as a collateral security, (*y*) nor receipt of interest from him on the joint debt, (*z*)

(*w*) *Brooke v. Enderby*, 2 B. & B. 70. *Newmarch v. Clay*, 14 East, 239. Clayton's case, 1 Meriv. 572.

(*x*) Clayton's case, 1 Meriv. 572. See the subject of Appropriation of Payments

discussed, post, B. III. in the Chapter on Contracts of Debt.

(*y*) *Bedford v. Deakin*, 2 B. & A. 210.

(*z*) *Gough v. Davies*, 4 Price, 200.

nor changing the heading of the account from the name of the firm to that of the single partner, and drawing on him for part of the balance will amount to such an agreement. (a) If indeed the creditor have been actually a party to the agreement of the late partners among themselves, it would probably be held that their acquiescence in that arrangement was a sufficient consideration for his promise which contributed to induce them so to acquiesce. (c)

As an entire firm may be bound, so it may also be discharged by transactions with a single partner, thus payment or satisfaction of a debt by one partner is payment or satisfaction by them all, (d) so a release to one partner is a release to them all. (e) But though a covenant not to sue an individual may, to avoid circuity of action, be pleaded by him as a release, yet a covenant not to sue one partner, does not release the rest, for it is as easy to give a release as such a covenant, and therefore the only reason for preferring the latter course must be to prevent the benefit from extending to a co-partner. (f)

SECTION VI.—*Rights of Partners against third persons.*

As to the rights of partners against third persons, they involve very few peculiar considerations; those few relate either to the mode in which they may be acquired, or that in which they may be determined.

As to the mode in which they may be acquired. It has been held, that where one party applies to another for a loan, without

(a) David v. Ellice, 5 B. & C. 196.
See Lodge v. Dicas, 3 B. & A. 611.

(c) Ibid, and see Good v. Cheesman,
2 B. & Ad. 334. Cartwright v. Cooke,
3 B. & Ad. 703.

(d) Innes v. Stephenson, 2 M. & M.
145. Cheap v. Cramond, 4 B. & A. 663.
Ballam v. Price, 2 Moore, 235. Clark

v. Clement, 6 T. R. 525.

(e) Co. Litt. 232. a. See Collins v.
Prosser, 1 B. & C. 682.

(f) Hutton v. Eyre, 1 Marsh. 608.
Thomas v. Courtney, 1 B. & A. 8. Lacy
v. Kynaston, 12 Mod. 551. Dean v.
Newhall, 8 T. R. 168.

enquiring whether the money is to be advanced by the lender as an individual, or as the member of a firm, he is liable either to the individual, or to the firm, as the advance may chance to be made. (g) It has also been held, that when one partner sells the goods of the firm in his own name, the whole partnership is nevertheless entitled to sue the buyer for the price. (h) But this right of theirs doth not preclude the buyer from setting off any debt due to him from the single partner, for the existence of that debt may have been his inducement to deal with him. (i) The above are cases of *direct* liability, and in which the defendant received a valuable consideration, *viz.* the goods or money of the firm. But even in cases of collateral liability, where a written agreement is required by the Statute of Frauds, it hath been held that the firm may sue upon a guaranty given to a single partner, if there be evidence that it was given for the benefit of all. (k) And in a case at N. P., Mr. J. Gaselee held, that a guaranty addressed to one partner would enure to the benefit of all, the guaranty having been given to secure payment for goods such as the firm were in the habit of dealing in, and the partner to whom it was given carrying on no separate trade; and further, that a guaranty, without an address, would enure to the benefit of those, to whom, or for whose use, it was delivered. (l)

Where a security is given to the firm, which is intended to continue in force, notwithstanding any change that may take place in its constitution; such intent must appear, either expressly, or by implication, upon the security. (m) Since other-

(g) *Alexander v. Barker*, 2 Tyrwh. 149.

(h) *Cothay v. Fennell*, 10 B. & C. 671. *Skinner v. Stocks*, 4 B. & A. 437. See *Rodwell v. Redge*, 1 C. & P. 220.

(i) *Stacy v. Decy*, 2 Esp. 468. 7 T. R. 361. See *George v. Claggett*, 7 T. R. 359.

(k) *Garrett v. Handley*, 4 B. & C. 664.

(l) *Walton v. Dodson*, 3 C. & P. 162, and see *Moller v. Lambert*, 2 Camp. 548.

(m) See *Barclay v. Lucas*, 1 T. R. 291., which is however doubted in *Strange v. Lee*; and see *Leadly v. Evans*,

wise it will, if by deed, become inoperative as to future events on the incoming or outgoing of a partner; (*n*) and the same rule is applied to simple contracts. (*o*) However, a promissory note, given to secure advances made by the firm, will be available for the benefit of future as well as present members, if such clearly appear to have been the intention of the makers. (*p*)

As to the mode in which the rights of the firm against third persons may be determined, the better opinion, as has been already stated, appears to be, that they may be released by any one of the partners, and there is no doubt that payment of a partnership debt to one member, is payment to all; and that even after the firm has been dissolved, (*q*) and notwithstanding a clause in the deed of dissolution, that another partner shall receive all the joint debts. (*r*) So one partner may give time to the debtor of the firm as by taking his acceptance, (*s*) or may preclude the partnership from suing, by some act which would render it unconscientious in himself to do so. (*t*) Thus, where Jacaud and Blair indorsed a bill to Jacaud and Gordon, and afterwards received effects from the drawer to discharge it, which they converted to their own purposes; it was held, that Jacaud and Gordon could not sue the acceptor on this bill. "Jacaud," said Lord Ellenbo-

2 Bingham. 32. Saunders v. Taylor, 9 B. & C. 35. Simson v. Ingham, 2 B. & C. 65. Simson v. Cooke, 1 Bingham. 452. See Metcalfe v. Bruin, 12 East. 400. 2 Camp. 422., where it was held that the trustees of a joint stock company might sue on a bond made to them, as such, notwithstanding a change in the company, for the obligor knowing the fluctuating nature of the company, must have so intended.

(*n*) See Lord Arlington v. Merrick, 2 Wms. Saund. 412. et notas. Strange v. Lee, 3 East. 484. Pemberton v.

Oakes, 4 Russ. 154. Dance v. Girdler, 1 N. R. 34. Weston v. Barton, 4 Taunt. 673. Wright v. Russell, 2 Bl. 934.

(*o*) Myers v. Edge, 7 T. R. 254. Exp. Kensington, 2 V. & Bea. 79.

(*p*) Pease v. Hirst, 10 B. & C. 122.

(*q*) Burton v. Taylor, 6 M. & S. 156.

(*r*) King v. Smith, 4 C. & P. 108.

(*s*) Tomlins v. Lawrence, 3 M. & P. 555.

(*t*) Richmond v. Heapy, 1 Star. 202. Sparrow v. Chisman, 9 B. & C. 241. Jacaud. v French, 12 East. 317.

rough, "being a partner with Blair, must be considered as having, together with Blair, received money to take up this very bill. How then can he, because he is also a partner with Gordon, be permitted to contravene his own act, and sue upon this bill which has been already satisfied as to him?"

SECTION VII.—*Joint Stock Companies.*

It only remains to make some few observations on that peculiar species of partnership, intituled a Joint Stock Company.

A joint stock company is a partnership, consisting of a very large number of members, whose rights and liabilities would be precisely the same as those of any other sort of partner, did not their multitude oblige them to adopt certain peculiar regulations for the government of the concern, which are ordinarily contained in an instrument, called a Deed of Settlement, and in an act of parliament passed expressly for that purpose.

The *Deed of Settlement* constitutes trustees of the partnership property, directors of the partnership affairs, auditors of its accounts, and such other officers as the object of the society require, and contains covenants for the performance of their respective duties, which are specifically set out, as are those of the other partners or shareholders; it also defines the number of shares, the power and method of transferring them, and of calling for the instalments required to be made thereon; the mode of convening general meetings of proprietors, their rights when convened, and a variety of other rules, suited to the exigencies of that particular undertaking. As far as the provisions of this instrument extend, it is the law by which the partnership affairs are to be governed; when it is silent the general law respecting partnership is to be followed.

It seems proper to make a few remarks on the clause almost always inserted in an instrument of this description, and by which the shares of each partner are rendered transferable without the consent of all the other shareholders, but subject in general to the approbation of the directors. By stat. 6 G. 1. c. 18. usually called the Bubble Act, companies of a certain tendency very loosely described therein were declared illegal, as was "the acting or presuming to act as a corporate body, the raising or pretending to raise transferable stock, transferring or pretending to transfer any share in such stock without legal authority." That act, which passed during the excitement occasioned by the speculations of the famous South Sea Company, has since been repealed.^(u) But there is no doubt, that "acting or presuming to act as a corporate body, is an offence at common law, viz. the usurpation of a royal franchise, and punishable as such by information; and it hath been supposed that a company which attempts to make its shares transferable without any restriction, at the mere will of the holders, is guilty of usurping the privileges of a corporation, and consequently illegal. "There can," said Best, C. J., "be no transferable share of any stock, except the stock of corporations, or of joint stock companies, *created by acts of parliament*—the pretending to be possessed of transferable stock, is pretending to act as a corporation, and pretending to possess a privilege which does not belong to many corporations."^(v)

Yet the above doctrine, which has never been solemnly established, appears very questionable; for it is difficult to say what end of public policy would be answered, by prohibiting partners from dispensing with the necessity of obtaining their own consent to the introduction of a new member into the firm, which is all that need be done, in order to make shares in the concern transferable without restriction at the will of the holder;

(u) By stat. 6 G. 4. c. 91.

267., and see *Joseph v. Pebrer*, 3 B. &

(v) In *Duvergier v. Fellowes*, 5 Bingh.

C. 639.

and in a late case, (w) Tindal C. J., speaks of such a proceeding without any marks of disapprobation. "The present case," says his lordship, "appears not to be governed by reference to the rules which restrain partners from parting with their shares in ordinary cases without each other's consent; for in this case, the power of transferring the scrip to any one, cannot but have formed a part of the known original design." Even before the repeal of stat. 6 G. 1. c. 18., Lord Ellenborough intimated, that "it may admit of doubt, whether the raising of transferable stock, is in any case *per se* an offence against the act, unless it has relation to some undertaking or project, which has a tendency to the common grievance, prejudice, or inconvenience of his Majesty's subjects, or of great numbers of them." (x) And it is quite clear, that a very slight restriction on the transferability of the shares, such for instance as the common one, by which the approbation of the directors is required, was even before the repeal of the act sufficient to render the company legal; (x) and would *à fortiori* be so now, if indeed the necessity of any restriction at all continue to exist.

The act of parliament usually enables the company to sue and be sued in the name of its secretary, or some one member to be appointed for that purpose, thereby obviating the technical objections that might arise in consequence of the non-joinder of some among a great number of partners, providing at the same time that the suit shall not be abated by the death of such nominal plaintiff or defendant, that he shall be indemnified against the consequences of the action, (z) and

(w) Fox v. Clifton, 9 Bingham. 120.

(x) R. v. Webb, 14 East. 406. See Josephs v. Pebrer, 3 B. & C. 639.

(y) R. v. Webb, supra. Pratt v. Hutchinson, 15 East. 511.

(z) Difficulties sometimes arise in obtaining execution against a company sued in this manner, the act often pro-

viding, either expressly or impliedly, that the nominal defendant shall not be liable to execution, or to attachment in case of a reference to arbitration. See Wormwell v. Hailstone, 6 Bingham. 676. Corpe v. Glyn, 3 B. & Ad. 801. In such cases the act sometimes goes on to provide, that execution may be issued against

not disqualified for a witness by his appearance as a party on the record. It sometimes prohibits the company from increasing their capital beyond a certain sum, and always concludes with a cautionary proviso, that nothing therein shall extend to incorporate the partnership, and a direction that the act shall be deemed public.

the members of the company, and then a suggestion of the facts must be previously entered on the record, since otherwise the execution would appear not to be warranted by the judgment, and the Court would set it aside on motion, *Bartlett v. Pentland*, 1 B. & Ad. 704. If the act contain no such provision, the plaintiff's remedy is by *mandamus*. *R. v. St. Katharine's Dock Co.* 4 B. & Ad.

360. *Corpe v. Glynn*. 3 B. & Ad. 801.

In a late case it was held, that a private act which directed, that the chairman might sue in behalf of the company, "for recovering any debts, or enforcing any claims or demands," entitled him to sue for a libel on the company. *Williams v. Beaumont*, 10 Bingh. 260. See on the other hand *Guthrie v. Fiske*, 3 B. & C. 178.

CHAPTER II.

CORPORATIONS.

A CORPORATION aggregate (*a*) consists of several individuals, united in such a manner, that they and their successors constitute but one person in law, a person distinct from that of any of the members, though made up of them all, and whose privileges and possessions when once vested in it, will be for ever vested, without any new conveyance to new successors; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law; as the river Thames is still the same river, though the parts which compose it are changing every instant. (*b*)

A corporation may exist by force of the common law, prescription, the king's charter, or an act of parliament; when erected, a name must be given to it, and by that name alone it must sue and be sued, and perform all legal acts; such name is the very being of its constitution, the knot of its combination, without which it could not perform its corporate functions; when it has been so formed and named, it acquires the right to have perpetual succession, to sue or be sued, implead or be impleaded, grant or receive by its corporate name, and do all other acts as natural persons may. Being however an invisible body, it cannot manifest its will by oral communication; a peculiar mode has therefore been devised for the

(*a*) The consideration of corporations
sole, is foreign to the subject of this

treatise.

(*b*) 1 Black. Comm. 468.

authentic expression of its intention, namely, the affixing of its common seal; and it is held, that though the particular members may express their private consents by words, or signing their names, yet this does not bind the corporation, it is the fixing of the seal, and that only which unites the several assents of the individuals composing it, and makes one joint assent of the whole. However, it has been considered that a *trading corporation* may differ from others, as to its powers of contracting, and its remedies on contracts relating to the purposes for which it was formed. (c) Thus, such a corporation may in some cases bind itself by promissory notes, (d) and bills of exchange; (e) and it was even held that the Bank of England might, without deed, appoint an agent for such purposes. (f) But a corporation will not have these extraordinary powers, unless the nature of the business in which it is engaged, raises a necessary implication of their existence. (g) It certainly appears, that there are other acts, mostly of a trifling nature, which every corporation may do without seal, or even writing. Such, it has frequently been said, is the hiring a common servant; (h) yet, it is so doubtful what acts are included within this exception, and the authorities are so conflicting, (i) that it is impossible to speak on this subject with confidence. Where a corporation can become

(c) 3 B. & Ad. 131.

(d) Stat. 9 Anne c. 1., and Bayley on Bills, 5th edit. p. 67.

(e) R. v. Bigg, 3 P. Wms. 419. Edie v. E. I. Compy., 2 Burr. 1216. admitted arguendo in Broughton v. Manchester and Salford Water Works Compy. 3 B. & A. 3.

(f) R. v. Bigg, supra.—N. B. there was a difference of opinion. See 1 Str. 18.

(g) Broughton v. Manchester & Salford Water Works Compy., 3 B. & A. 1. Murray v. E. I. Compy., 5 B. & A.

204. Dunstan v. Imp. Gas Light Compy., 3 B. & Ad. 125. Slark v. Highgate Archway Compy., 5 Taunt. 792.

(h) Plowd. 91. Vin. Abr. Corp. K. Bro. Corp. 47. 3 Lev. 127. 1 Salk. 191. Com. Dig. Franchises F. 13. Horne v. Ivy, 1 Vent. 47. R. v. Bigg, supra. Yarborough v. B. of England, 16 East. 6. 4 H. 7. 6. 13 H. 7. 17. 13 H. 8. 12. 1 Saund. 305. b.

(i) 1 Mod. 18. Bro. Corp. 24. 34. Dunstan v. Imp. Gas Light Compy. 3 B. & Ad. 130.

party to a bill, it may be sued upon it in assumpsit; (*k*) and in action upon policies of insurance, made by the two incorporated insurance companies, and which are therefore always by deed, a general form of plea is given to the defendants by stat. 11 G. 1. c. 30. s. 43.

A corporation has a right to make bye laws for its own government, which are binding upon the members, unless contrary to the law of the land, or the directions of their charter; (*l*) and this power of making bye-laws may be delegated by the whole body to a select part, which thus becomes the representative of the whole community. (*m*) A corporation may be dissolved; first, by act of parliament; secondly, by the natural death of all its members; thirdly, by surrender of its franchise to the king; fourthly, by forfeiture of its charter through negligence, or abuse of its franchise.

Here it is to be observed, that debts to, or from a corporation, are generally speaking, wholly extinguished by its dissolution, so that the members cannot recover, or be charged with them in their natural capacity; however, by stat. 6 G. 4. c. 91., it is enacted, that in any charter hereafter to be granted by his majesty, his heirs or successors, for incorporation of any body, or company of persons, it shall be lawful to provide, that the members shall be individually liable in their persons and property, for the debts, contracts, and engagements of such corporation, to such extent, and subject to such regulations and restrictions as his majesty may deem fit, and the members shall be liable accordingly. In consequence of this act, when trading companies are incorporated, it is

(*k*) *Edie v. E. I. Compy.*, 2 Burr. 1216. *Murray v. E. I. Compy.*, 5 B. & A. 204. *Slark v. Highgate Archway Compy.*, 5 Taunt. 792. *Broughton v. Manchester Water Works*, 3 B. & A. 1.

(*l*) *R. v. Cutbush*, 4 Burr. 2204. *Kirk v. Nowell*, 1 T. R. 118. See 4

Burr. 2260. 3 Burr. 1827. 47. 2 Bro. P. C. 394. 329. 2 M. & S. 53. 7 T. R. 543. 1 Burr. 12. 6 T. R. 732. 11 Rep. 54.

(*m*) Per *Ld. Mansfield*, 3 Burr. 1837. *Rex v. Westwood*, 7 Bingh. 1.

usual to provide in the charter, that the private property of individual partners shall be liable to the debts of the company, in case of an execution on a judgment obtained against it, in proportion to their individual shares, and no doubt that statute authorises the crown to extend the liability of members beyond the period of the dissolution of the body corporate.

CHAPTER III.

PRINCIPAL AND AGENT.

SECTION 1. *Definition and character of agent.*

2. *Rights of principal against agent.*
3. *Rights of agent against principal.*
4. *Rights of third parties against principal.*
5. *Rights of principal against third parties.*
6. *Rights of agent against third parties.*
7. *Rights of third parties against agent.*

SECTION I.—*Definition and Character of Agent.*

As a comparatively small part of an extensive business can be carried on by the unassisted exertions of the trader, whether sole or the member of a partnership or corporation, the agents by whom he is obliged to transact the remainder constitute an important, though subordinate, class of mercantile persons; this book will therefore conclude with a sketch of the law relating to them.

An *agent* is a person authorised to do some act or acts, in the name of another, who is called his *principal*. Whatever a man has power to do in his own right, he may appoint an agent to do for him. I say *in his own right*, for one agent cannot nominate another to perform the subject of his agency, *vicarius non habet vicarium.* (a) It is true, that when, from

(a) Roll. Abr. 330. 9 Co. 77 b. 298. Cockran v. Irlam, 2 M. & S.
Coles v. Trecothick, 9 Ves. 236. 251. 301. Schmaline v. Tomlinson, 6 Taunt.
252. Solly v. Rathbone, 2 M. & S. 147. Catlin v. Bell, 4 Camp. 184.

the nature of his trust, it cannot be expected that he should accomplish it all by his own personal exertions, he will be allowed to employ others to assist him; and therefore, where a factor lodged goods in the warehouse of the South Sea Company, the Court held that he had a right to do so, for that a bailiff, *ad merchandizandum*, is not obliged to keep the goods always about him. (b) In these cases, however, he does not so much delegate his agency, as exercise a power impliedly contained in his appointment; in doing which, he must act with precaution, and not exceed what is prudent under the circumstances of the case, and warranted by the usage of trade.

Some persons may be agents for others who could not act in their own capacity. An infant, or *fême coverte*, may become an agent, the latter even for her own husband. (c) But it has been decided that one of two contracting parties cannot be agent for the other, even with that other's consent, so as to bind him by a writing within the statute of frauds. (d)

An agent may in general be appointed by bare words, or such appointment may be inferred from the conduct of his supposed principal respecting him; (e) there are, however, cases in which the nomination must be in writing, or even by deed. (f) The appointment of an agent for the purposes specified by the 1st, 2nd, and 3rd sections of the Statute of Frauds, (g) must be by writing; and it is a general rule that an agent who is to execute a deed, (h) or to take or give livery

(b) Goswell v. Dunkley, Str. 681.
See Bromley v. Coxwell, 1 B. & P. 438.

(c) Co. Litt. 52. a. Emerson v. Blonden, 1 Esp. 142. Palethorpe v. Furnish, 2 Esp. 511. Prestwick v. Marshall, 7 Bingh. 565.

(d) Wright v. Dannah, 2 Camp. 203.
Farebrother v. Simmons, 5 B. & A. 333.
Raynor v. Linthorn, 1 R. & M. 325.

Cooper v. Smith, 15 East. 103. See however, Bird v. Boulter, 4 B. & Ad. 448. and the dicta of the Judges there.]

(e) See post Sect. 4.

(f) Bac. Abr. Authority, A.

(g) 29 Car. 2 cap. 3.

(h) Harrison v. Jackson, 7 T. R. 209. Elliott v. Davis, 2 B. & P. 338.
Horsley v. Rush, cited 7 T. R. 209.

of seisin, (*i*) must be appointed by *deed* for that purpose. Moreover, as a corporation aggregate can in general act only by deed, its agent must be so appointed, (*k*) though it would seem that some trifling agencies, even for corporations, may be created without one; (*l*) and there is one case in which it was considered that a corporation might, without deed, empower an agent to do acts in the common course of its corporate business, as to make notes for a banking corporation.

There are two extensive classes of mercantile agents, viz.—*factors*, who are entrusted with the possession as well as the disposal of property, and *brokers*, who are employed to contract about it, without being put in possession. But though *brokers* are usually employed in the manner first stated, yet every person so employed is not a *broker*; thus it would seem, that neither auctioneers (*m*) nor merchants acting by commission from correspondents abroad, (*n*) can properly be called *brokers*. It is perhaps strange that the meaning of the word should not be better ascertained, for by St. 6 Ann. c. 16. brokers in London must be admitted by the Mayor and Aldermen, paying 40s. on admission, and a like sum annually, under a penalty of 25*l.*; in pursuance of which act, regulations were afterwards made by the court of mayor and aldermen concerning the admission of brokers, whereby they are required to take an oath, and enter into a bond for the observance of certain regulations, respecting which, and the mode in which the bond itself is construed, the authorities cited *in margine* may be consulted. (*o*)

Berkeley v. Hardy, 5 B. & C. 355.
Williams v. Walsby, 4 Esp. 220. Steig-
litz v. Egginton, 1 Holt, 141.

(*i*) 2 Roll. Abr. R. pl. 3. 4.

(*k*) 9 Edw. 4 pl. 59. Bro. Corp.
24. 34. 1 Roll. Ab. 514. 1 Mod. 18.

(*l*) Plowd. 91. Vin. Abr. Corp. K.
Rex v. Bigg, 3 P. Wms. 419. See St.
3 & 4 Anne, cap. 9. Bro. Corp. 47.
per Townsend, J. Ibid. 48. per Lit-

leton J. 3 Lev. 127. 3 Salk. 191-2.

See St. 6. G. 4. c. 16. s. 46. See also
Dunstan v. Imperial Gas Light Co. 3 B.
& Ad. 125. and Dean and Chapter of
Windsor v. Gover, 2 Wms. Saund.
305 b.

(*m*) Wilks v. Ellis, 2 H. Bl. 555.

(*n*) Janson v. Green 4 Burr. 2104.

(*o*) 1 Meriv. 156. 157. 1 Holt, N.
P. C. 431, 2, 3. 7 Taunt. 260. 1 Moore,

There are some peculiar enactments relating to stock-brokers. St. 10 Anne. c. 19. s. 12. limits their commission on government stock to 2s. 9d. per cent., and 7 G. 2. c. 8., commonly called Sir John Barnard's Act, requires each of them to keep a book, called *the broker's book*, in which he is to enter all contracts for stock made by him on the same day, with the names of the parties and the day, which book he is to produce when lawfully required. (p)

Having stated what is, and who may be, an agent; how, and by whom, he may be nominated, let us proceed to consider the results of such nomination as they affect,

1. The mutual rights of the agent and his principal.
2. Those of the principal and third parties.
3. Those of the agent and third parties.

SECTION II.—*Mutual Rights of the Agent and Principal.*

Rights of the Principal.

The duties of the agent to his principal must of course depend on the instructions contained, either expressly or impliedly, in his appointment; for, be those what they may, his duty is to carry them into effect, if possible, to the letter; (q) unless, indeed, his obedience would involve a fraud on third persons, for no contract can oblige a man to make himself the instrument of fraud. (r) The appointment is his only authority; it may be *general*, to act in all his principal's affairs, or *special*, concerning some particular object; it may be *limited*, by certain instructions, as to the conduct he is to pursue, or *unlimited*, *i. e.* leaving his conduct to his own discretion; but this discretion should not be exercised at random, for in the

6. 2 Stark. 14. 1 Nev. & Mann. 492.

(q) *Guerreiro v. Peile*, 3 B & A.

(p) See *Dunbar v. Wilson*, 6 Bro. 616.

P. C. 6.

(r) *Bexwell v. Christie*, Cowp. 395.

absence of specific instructions, it is his duty to pursue the accustomed course of that business in which he is employed. (s) And he must possess a competent degree of skill, in order to enable him to do so ; if he engage without such skill he is a deceiver, and will be justly liable for the consequences of his incapacity ; he is, moreover, responsible not only for himself, but for those whom he may employ under him. (t) The most satisfactory mode of determining whether he have exercised such skill is, to shew by evidence whether a majority, or even moiety, out of a given number of skilful and experienced persons, would have acted as he has done. (u) Of whatever description his authority may be, if he exceed it, and any loss ensue, that loss will fall on him ; (w) though if a benefit result, he will not be allowed to share it, but must account for it to his employer. (x) However, if his principal subsequently recognize his departure from the letter of his instructions, he is exonerated for *omnis ratihabitio retrotrahitur et mandato equipatur*. And such a recognition may be inferred from the employer's conduct ; thus, the receipt of interest on a sum lent by the agent recognizes the loan. (y)

It has been already said, in the Chapter on Partnership, that from a person standing in a situation of confidence with regard to another, the strictest *good faith* is required. This maxim applies in full force to agents, (z) of whose morals the law is so careful that it will not suffer them even to incur temptation ; thus, an agent employed to sell is not allowed to be the purchaser, at least not unless he make known that he

(s) Russell v. Palmer, 2 Wilson, 325.
See Moore v. Mounge, Cowp. 480. 2
T. R. 188. in notis. Pitt v. Yalden, 4
Burr. 2061. Russell v. Hankey, 6 T.
R. 12. Warwick v. Nokes, Peake 68.

(t) Lord North's case, Dy. 161.

(u) Chapman v. Walton, 10 Bingh.
63.

(w) Catlin v. Bell, 4 Camp. 184.

(x) Beawes, 41. Russell v. Palmer,
2 Wils. 325. and post.

(y) Clarke v. Perry, 2 Freem. 48.
Prince v. Clark, 1 B. & C. 186.

(z) Huguenin v. Basely, 14 Ves.
273.

intends to become such, and furnish his employer with all the knowledge he himself possesses ; (a) or unless the Court, perceiving that the principal would lose by a re-sale, think fit on that account to uphold the transaction, (b) so neither can an agent employed to purchase be himself the seller, unless there was a plain understanding between him and his principal to that effect. (c) The legislature has, in one instance, enforced these doctrines, by prohibiting agents, employed to buy or sell cattle in London, from buying or selling on their own account ; (e) and it has, as we have seen, been held that one contracting party cannot act as the agent of the other, even with that other's consent, so as to bind him by a writing within the Statute of Frauds. An agent will not be allowed to dispute the title of his principal to the subject matter of the agency. (f) Thus, a wharfinger who has acknowledged that he holds goods for a particular transferee, cannot afterwards refuse to deliver them to him, and if he do refuse, is liable in trover.

It is a very essential part of the *good faith* required from him, that he should keep a clear account and communicate the result from time to time to his employer, (g) though an

(a) *Lowther v. Lowther*, 13 Ves. 103. *Wren v. Kirton*, 8 Ves. 502. *Coles v. Trecothick*, 9 Ves. 234. *Morse v. Royal*, 12 Ves. 355. *Crowe v. Ballard*, 3 Bro. C. C. 119.

(b) *Lowther v. Lowther*, Lord Hardwicke *v. Vernon*, 4 Ves. 411. *Whitcombe v. Minchin*, 5 Madd. 91. *Oliver v. Court*, Dan. 301. 8 Price 127.

(c) *Massey v. Davies*, 3 Ves. jun. 217. See *E. I. Compy. v. Henschman*, 1 Ves. jun. 289.

(e) Stat. 31 G. 2. c. 40. s. 11.

(f) *Holl v. Griffin*, 10 Bingh., 246. where the acknowledgment was prospective. *Dixon v. Hammond*, 2 B. &

A. 310. *Roberts v. Ogilby*, 9 Price 269. *Gosling v. Birnie*, 7 Bingh. 339. *White v. Bartlett*, 9 Bingh. 378. Vide *Sims v. Brittain*, 4 B. & Ad. 376. However, if the property in the agent's hands have been *fraudulently* obtained by the principal from third persons, this rule does not apply. *Hardman v. Wilcox*, 9 Bingh. 382.

(g) *Lord Chedworth v. Edwards*, 8 Ves. Jun. 49. *Lord Hardwicke v. Vernon*. 14 Ves. 510. *Topham v. Braddick*, 1 Taunt. 572. *Lady Ormond v. Hutchinson*, 13 Ves. 47. *Lupton v. White*, *Panton v. Panton*, 15 Ves. 436.

inferior agent is accountable only to his own immediate master. (*h*) In stating this account, the principal will, in the absence of his own express or implied agreement to the contrary, (*k*) be entitled to every increase made from his own property. (*l*) Thus, an agent who has made interest upon his principal's money will, in general, be obliged to account for it; (*m*) however, a mere stakeholder, such as an auctioneer receiving a deposit will be excused; (*n*) and no interest is due for money which has lain dead in the agent's hands, unless his employment was of such a nature as to render it his duty to invest it. (*o*) He will also be charged with all payments actually made to him, and with all losses incurred by his own negligence, or even through the imposition of a forger; for when an agent is called on to transfer his employer's property by virtue of an authority given to a stranger, he must examine into its validity at his peril. (*p*) But he will not be chargeable with any loss incurred by him, without

(*h*) *Cartwright v. Hateley*, 1 Ves. jun. 292. *Pinto v. Santos*, 5 Taunt. 447. *Stephens v. Badcock*, 3 B. & Ad. 357.

(*k*) *Ld. Chedworth v. Edward*, 8 Ves. 48. *Beaumont v. Boulton*, 11 Ves. 360. See *Shepherd v. Maidstone*, 10 Mod. 144.

(*l*) *Brown v. Litton*, P. Wms. 141. *Massey v. Davies*, 2 Ves. jun. 317. — *v. Jolland*, 8 Ves. 72. *Diplock v. Blackburn*, 3 Camp. 43. See *Taylor v. Plumer*, 3 M. & S. 562.

(*m*) See *Rogers v. Boehm*, 2 Esp. 704.

(*n*) *Harrington v. Hoggart*, 1 B. & Ad. 577.

(*o*) — *v. Jolland*, 8 Ves. 72. It is on this principle, viz. that the employer has a right to every increase made from his own property, that if he engage a

servant or agent, stipulating for his whole time and labour, *ex. g.* the master of a ship, and that servant undertake another agency, the first employer will be entitled to retain against the servant any remuneration earned by him in his second occupation. For the servant's whole time and labour is the master's property, and consequently the remuneration earned therewith is an increase made from his property. *Thompson v. Havelock*, 1 Camp. 529. *Diplock v. Blackburne*, 3 Camp. 43. Abb. on Shipp. part 2. cap. 4.

(*p*) *Foster v. Clements*, 2 Camp. 17. See *Smith v. Mercer*, 6 Taunt. 76. *Rogers v. Kelly*, 2 Camp. 123. *Wilkinson v. Johnson*, 3 B. & C. 428.

default or negligence, while he is engaged in the prudent exercise of his discretion, and in pursuance of the regular and accustomed course of trade. (q) It seems, however, that if he place his principal's money to his own account at his banker's, without any mark distinguishing it from his own, he will be answerable for it if the banker fail; for otherwise he might treat it as his own if the banker's solvency continued, and as his principal's in case of a failure. (r)

It was once hinted, that an action of account was the only mode of investigating a running account between agent and principal in a court of law, (s) which would be equivalent to saying, that the parties must have recourse to equity. However, it is now clear, that if the items can be proved, *indebitatus assumpsit* will lie for the balance; (t) and according to Gibbs C. J., the foundation of an action of account is, that the party wants an account, and is not able to prove his items without it, in which case he may either maintain a special action against his agent, for his breach of duty in refusing to account, (u) or seek relief in equity, (w) where he may have a discovery of books and papers, and the benefit of the defendant's oath.

As mercantile agents are generally employed in sales or purchases, let us examine somewhat more particularly their duties, with reference to those contracts.

A factor is bound to keep the goods entrusted to him for sale, with the same care that a prudent man would keep his

(q) Russell v. Hankey, 6 T. R. 12.
Knight v. Lord Plymouth, 3 Atk. 480.
Exp. Parsons, Ambl. 219. Warwick
v. Nokes, Peake, 68.

(r) See Wren v. Kirton, 11 Ves. 382.
Massey v. Banner, 1 J. & W. 241. 4
Madd. 413. Fletcher v. Walker, 3 Madd.
73.

(s) Scott v. M'Intosh, 2 Camp. 238.

(t) Tomkins v. Wiltshire, 1 Marsh.
115. 5 Taunt. 431. Arnold v. Webb,
5 Taunt. 432 in not.

(u) Wilkins v. Wilkins, Carth. 89.
Salk. 9.

(w) Mackenzie v. Johnson, 4 Madd.
373. See Scott v. Surman Willes,
404.

own ; (x) he is not liable in case of robbery, fire, or other accidental damage, happening without his default, (y) unless previous to such damage he had committed some improper act ; had it not been for which the property might have escaped, for then he will be answerable ; (z) and will not be allowed to say, that perhaps it might not have escaped, even had he acted rightly, for it is a rule of law, that *no man shall qualify his own wrong*. (a) Where goods are consigned to a factor, it is his duty to insure them, or at least, make every usual exertion to insure them at the request of his principal, if in the course of their previous dealings he have been used to do so, or even though he may not have been used, if he have effects in hand enough to cover the expenses of insurance, or if the bill of lading contain a requisition to insure ; for by accepting the goods under it, he agrees to such requisition. In any of these cases, if he neglect to make the fit insurance, he will be responsible for damage which would have been covered thereby. (b)

If any price be limited by his instructions, he must sell for that ; if none, for what the goods are fairly worth ; and if the property be of a description commonly sold for ready money only, he must not sell upon credit ; for an agent employed ge-

(x) *Coggs v. Bernard*, 2 L. Raym. 917. *Vere v. Smith*, 1 Vent. 121.

(y) *Co. Litt.* 89. a. *Anon.* 2 Mod. 100. *Vere v. Smith*, 1 Vent. 121. The liability of carriers and innkeepers is more extensive. As to the former, see Book 3. ch. Contracts with Carriers. As to innkeepers, they are bound to keep their guests' property safe from thieves, *Calye's case*, 8 Rep. 33 a. *Richmond v. Smith*, 8 B. & C. 9., *Kent v. Shuckland*, 2 B. & Ad. 803., unless indeed the guest were guilty of gross negligence, *Burgess v.*

Clements, 4 M. & S. 306., or the thieves were his own companions or servants, *Calye's case*, 8 Co. 2. But this peculiar liability of the carrier and innkeeper is on account of the peculiar nature of their respective employments, 2 Lord Raym. 916. 17.

(z) *Caffrey v. Darby*, 6 Ves. 496.

(a) *Davis v. Garrett*, 6 Bingh. 723.

(b) *Smith v. Lascelles*, 2 T. R. 189. *Smith v. Cadogan*, 2 T. R. 188 in notis. *Wallace v. Telfair*, *ibid.* *Delaney v. Stoddart*, 2 Ves. 239.

nerally to do any act, is authorised to do it only in the usual way of business. (c) But if he be factor in a sort of dealing or trade, where the usage is to sell upon credit; then, if he sell to a person of good credit at the time, he is discharged, and will be entitled to his commission, though such vendee may afterwards become insolvent, (d) provided that the credit which he gave was reasonable and usual, and that his principal was made acquainted with the transaction within a reasonable and usual space of time. However, as some merchants do not choose to run this risk, and to trust so implicitly to the discretion of their factors, an agreement called *del credere* has been invented, the name of which is taken from an Italian mercantile phrase, signifying guarantee; and by which the factor, for an additional premium beyond the usual commission, when he sells goods on credit, becomes bound to warrant the solvency of the purchaser. (e) It was at one time thought that an agent acting under a *del credere* commission, was not merely a surety, responsible only in case of the default of the purchaser, but that he was liable to his principal in the first instance; (f) but that doctrine has been questioned, and at last overturned by subsequent authorities, (g) which have settled, that he is but a surety. If, indeed, the factor, after the sale, remit his own note or acceptance to his principal for the amount of the proceeds, he will be liable on that, whether employed under a *del credere* commission or not, and whether the vendee be or be not solvent. For, by giving such an instrument he lulls all the suspicions of his employer, and

(c) *Wiltshire v. Sims*, 1 Camp. 258.

(d) *Anon.* 12 Mod. 514. *Scott v. Surman Willes*, 406. See *Russell v. Hankey*, 6 T. R. 12. *Knight v. Plymouth*, 3 Atk. 480.

(e) See *Mackenzie v. Scott*, 6 Bro. P. C. 280. Tomlin's Ed.

(f) *Grove v. Dubois*, 1 T. R. 112.

Bize v. Dickason, 1 T. R. 285. *Weinolt v. Roberts*, 2 Camp. 586.

(g) *Morris v. Cleasby*, 4 M. & S. 566. *Hornby v. Lacy*, 6 M. & S. 66. *Cumming v. Forrester*, 1 M. & S. 494. *Baker v. Langhorn*, 6 Taunt. 519.

causes him to dismiss all care about the solvency of the purchaser. (*h*)

With respect to Purchases. As no agent can lawfully exceed his orders, it follows, that if he do so, his principal may refuse the goods improperly purchased: and it has been said, that in such case, if he have advanced money on them, he may, instead of returning, take upon himself to dispose of them, as factor for the agent who transgressed his orders. (*i*) But then he must repudiate the transaction, and give notice of his disagreement to the agent within a reasonable time, else he will be taken to have adopted it, and the loss, if any, will fall upon himself; (*k*) and it has been intimated, (*l*) that though an agent exceed the price named in his instructions; yet, if by means of doing so, he effect a saving on the same goods equal in amount to the excess of price, equity at least would consider him as justified.

In conclusion of this head we must observe, that there is a difference between the principal's rights against a remunerated, and against an unremunerated agent. The former having once engaged, may be compelled to proceed to the task which he has undertaken, the latter cannot, for his promise to do so, being induced by no consideration, the rule *ex nudo pacto non oritur actio* applies. (*m*) But if he do commence his task, and afterwards is guilty of misconduct in performing it, he will, though unremunerated, be liable for the damage so occasioned; since by entering upon the business, he has prevented the employment of some better qualified person, and the detriment thus occasioned to his principal, is a sufficient consi-

(*h*) *Lefevre v. Lloyd*, 5 Taunt. 749.
Simpson v. Swan, 3 Camp. 291. *Goupy v. Harden*, 7 Taunt. 159.

(*i*) Paley in P. & A. cap. 1. sect. 7.
Cornwall v. Wilson, 1 V. sen. 509. See
Kemp v. Prior, 7 V. jun. 240.

(*k*) *Cornwall v. Wilson*, 1 Ves. sen. 509. *Prince v. Clarke*, 1 B. & C. 186.

(*l*) In *Cornwall v. Wilson*.

(*m*) *Elsee v. Gateward*, 5 T. R. 143.
1 Esp. 74. *Coggs v. Bernard*, 2 L. Raym. 909.

deration to uphold an undertaking on his part to act with care and fidelity ; (*n*) still it appears, that less skill is required from him than from a paid agent, (*o*) unless he act in a public or professional character, in which case he holds himself out as possessing, and will be assumed to possess, skill, his omission to use which constitutes gross negligence. (*p*)

SECTION III.—*Rights of Agent against Principal.*

The chief right of the agent is to receive his remuneration, or as it is often called, commission ; the amount of which is fixed either by contract between him and his employer, or by the usage of trade in like cases, (*q*) or in some few instances, as in those of navy agents and brokers, or solicitors negotiating annuities and loans, by act of parliament. (*r*) He may, however, be deprived of it in several ways ; if the object of his employment be illegal, he can of course claim none ; (*s*) he may also forfeit it by misconduct, as by neglect to keep an account, that being an essential part of his employment, (*t*) or if gross negligence or want of skill on his part prevent his employer from deriving any benefit from his services, (*u*) *à fortiori* if he betray his trust and act adversely to his prin-

(*n*) *Coggs v. Bernard*, 2 L. Ray. 909.
Wilkinson v. Coverdale, 1 Esp. 74.

(*o*) 2 Ld. Raym. 909. 2 Atk. 406.

(*p*) *Shiells v. Blackburne*, 1 H. Bl. 161. See *Bourne v. Diggles*, 2 Chitt. 311. *Dartnall v. Howard*, 4 B. & C. 345.

(*q*) See *Eicke v. Meyer*, 3 Camp. 412. *Cohen v. Paget*, 4 Camp. 96. *Roberts v. Jackson*, 2 Stark. 225. *Levi v. Barnes*, 1 Holt. 412. *Chapman v. De Tastet*, 2 Stark. 204. *Stewart v. Kahle*, 3 Stark.

361. See also *Bower v. Jones*, 8 Bingham. 65.

(*r*) 31 G. 2. c. 10. s. 30. 17 G. 3. c. 26. 12 Anne, stat. 2. c. 16. s. 2. See *Pryce v. Wilkinson*, 2 Bingham. 470.

(*s*) *Stackpole v. Earle*, 2 Wils. 133. *Josephs v. Pebrer*, 3 B. & C. 639.

(*t*) *White v. Lady Lincoln*, 8 Ves. 371. See 11 Ves. 355.

(*u*) *Denew v. Daverell*, 3 Camp. 451. *White v. Chapman*, 1 Stark. 113. *Hammond v. Holiday*, 1 C. & P. 384. *Hill v. Featherstonhaugh*, 7 Bingham. 569.

cipal. (w) As the usage of trade may regulate the amount of his commission, so it may, under certain circumstances, deprive him entirely thereof; thus it would seem, that a ship-broker can charge a ship-owner nothing for his labour in procuring a charterer for the ship, unless the owner think proper to conclude a charter party with him; (x) in these cases the usage is looked on as incorporated into the contract of agency. But we have seen, that in ordinary cases the agent, if he act with competent discretion and fidelity, and without deviating from the regular course of business, will not be answerable for any loss that may occur to his employer's property, and will notwithstanding such loss, be entitled to his commission.

Besides commission, he has a right to charge his principal with all advances made by him *in the regular course of his employment*. I say *in the regular course*, for such advances the principal who deputed him in a business where they are necessary, has impliedly requested him to make. Such are charges for duties, warehousing, and portorage; concerning the first of which it has been said, that if an agent at his own risk evade the payment of the foreign customs, he may charge them to his principal as paid; (y) but not so if home customs, for that would be a fraud upon the king. (z) However, the former part of this proposition has been questioned, (a) and appears very questionable. But though the principal's request may be inferred, where the advances are made in the *regular course of trade*, or even on the spur of some pressing exigency, not provided for by any ordinary rule, since the employer may fairly be taken to have authorised the em-

(w) Hurst v. Holding, 3 Taunt. 32.

(x) Broad v. Thomas, 7 Bingh. 99.

Read v. Rann, 10 B. & C. 440. Lloyd
& Welsby, 121. Dalton v. Irvin, 4 C.
& P. 289.

(y) Smith v. Oxenden, 1 Ch. Ca. 25.

Eq. C. Ab. 369. See 3 Salk. 235. Skinner 149.

(z) Borr v. Vandall, 1 Ch. Ca. 30.
Eq. Ca. Ab. 370.

(a) 13 Viner's Abr. 3., by Lord

North.

ployed to do under any circumstances, that which a prudent man would conceive necessary for the safeguard of his interests, *ex gr.* to insure a cargo, which is in extraordinary danger, on account of the lateness of the season. (b) Yet, if an agent think fit to make a payment out of the regular course of business, he will not, unless he can show circumstances from which his principal's authority may be inferred, be entitled to repayment. (c) Moreover, though he is entitled to be repaid his regular expenses, yet, if he conduct himself so negligently in his employment, as to incur expenses, which would not have been necessary had he acted rightly, he will be allowed nothing on account of them. (d)

SECTION IV.—*Rights of third Persons against Principal.*

Next in order are the considerations respecting the mutual rights of the Principal and third Persons.

As far as the agent's authority extends, he has a right to bind the principal to third persons. Now his authority may, as we have seen, be either expressly given, or inferred from the acts of his supposed principal. When it is expressly given, there can be no doubt as to its extent, except from the uncertainty of words employed in delegating it. When however it is to be inferred from the conduct of the principal, that conduct furnishes the only evidence of its extent as well as of its existence; and in solving all questions on this subject, the general rule is, *that the extent of the agent's authority is (as between his principal and third parties) to be measured by the extent of his usual employment*; for he who accredits

(b) Wolfe v. Horncastle, 1 B. & P. 323.

(c) French v. Backhouse, 5 Burr. 2727. Edmiston v. Wright, 1 Camp. 88. Howard v. Tucker, 1 B. & Ad. 712.

Child v. Morley, 8 T. R. 610. Wilson v. Creighton, 1 T. R. 113. Stokes v. Lewis, 1 T. R. 20.

(d) Capp v. Topham, 6 East. 392.

another by employing him, must abide by the effects of that credit, and will be bound by contracts made with innocent third persons, in the seeming course of that employment, and on the faith of that credit, whether the employer intended to authorise them or not; (e) since where one of two innocent persons must suffer by the fraud of a third, he who enabled that third person to commit the fraud should be the sufferer. On this principle it is, as we have seen in the first chapter, that one partner can bind another to contracts within the scope of the partnership business; the same principle is well illustrated by Lord C. J. Holt, (f) who says, "If a man send his servant with ready money to buy goods, and the servant buy upon credit, the master is not chargeable. But if the servant *usually* buy for the master upon tick, and the servant buy some things without the master's order, yet if the master were trusted by the trader, he is liable." The same principle is applied to cases respecting notes or bills, which if drawn, indorsed, or accepted by a clerk, who has been previously allowed to do so, bind the master, though the money never come to his use; (g) it is applied to sales (h) and guaranties, (i) in a word, to every species of mercantile transaction, and whether the agent have or have not been dismissed from his employer's service, provided that the third party had no reason

(e) See *Pickering v. Busk*, 15 East. 38. *Townsend v. Inglis*, Holt 278. *Whitehead v. Tucket*, 15 East. 400. *Barber v. Gingell*, 3 Esp. 60. *Haughton v. Ewbank*, 4 Camp. 88. *Watkins v. Vince*, 2 Stark. 368. See 10 Mod. 111. Moll. 282.

(f) Shower 95. *Weyland's case*, 3 Sal. 234. *Rusby v. Scarlett*, 5 Esp. 76.

(g) *Prescott v. Flinn*, 9 Bingh. 21. *Boulton v. Arlesden*, 1 Sal. 234. *Barber v. Gingell*, 3 Esp. 60. *Houghton v. Ewbank*, 4 Camp. 88. See 12 Mod. 346.

Molloy 107., an authority to draw does not import authority to indorse; but evidence of such authority to draw is not to be withheld from the jury, who are to determine whether such authority to indorse exists or not, and who may be justly satisfied with less evidence thereof, where it is proved that the clerk is a confidential clerk, and has undisputed authority to draw in the name of his principal. *Prescott v. Flinn*, 9 Bingh. 23.

(h) *Pickering v. Busk*, 15 East. 38.

(i) *Watkins v. Vince*, 2 Stark. 368.

to be aware of the determination of his employment, (*k*) which has occasioned a learned writer to suggest the propriety of giving notice in the Gazette, and by circulars, whenever a mercantile agent's employment is determined, as is the practice on the dissolution of a partnership. Nor can the principal relieve himself by agreeing with his agent, that the latter shall take the liability on his own shoulders, for strangers not cognizant of such agreement are not bound by it. (*l*)

The nature of the authority to be inferred, and the sufficiency of the principal's acts to raise the inference, must of course depend on the special circumstances of each case, and involve questions fit for the consideration of a jury; (*m*) there is one instance in which the recognition of a single purchase made by his servant upon credit, was held to bind the principal to a succeeding one. (*n*) However, as the employment is the measure of the authority to be inferred, if there were no previous employment, there can of course be no inference of authority; in such a case, the party who trusts a servant, does it at his peril, since the master will only be liable for what comes to his use, and not even for that, if he gave his servant money to pay for it; (*o*) and as the employment is the measure of the authority, an employment in one line of business affords no inference of authority to act in another. (*p*)

It follows from the above observations, that an agent may be tied down by very strict directions, as between himself and principal, whom he may notwithstanding have power to bind

(*k*) 10 Mod. 111. 12 Mod. 346. Molloy 107. 282.

(*l*) *Precious v. Abel*, 1 Esp. 350. *Rich v. Coe*, Cowp. 636. *Waring v. Favenc*, 1 Camp. 85.

(*m*) See *Dyer v. Pearson*, 3 B. & C. 38. *Hazard v. Treadwell*, 1 Str. 506. *Todd v. Robinson*, 1 R. & M. 217. *Gilman v. Robinson*, ib. 226. *Boulton v. Arlson*, 1 Sal. 234. *Anderson v. San-*

derson, 2 Stark. 204. *Stubbing v. Heintz*, Peake 48. *Weyland's case*, 3 Sal. 234. *Rusby v. Scarlett*, 5 Esp. 76.

(*n*) *Hazard v. Treadwell*, 1 Str. 506.

(*o*) See *Paley*, P. & A. 164. 1 Ld. Raym. 225. *Kilgour v. Finlayson*, 1 H. Bl. 156.

(*p*) See *Boucher v. Lawson*, Rep. Tem. Hardwick 85.

by contracts, unauthorised by, and even in defiance of them. Cases of this sort occur, when a *general agent*, as he is called, exceeds his instructions. A *general agent* is a person whom a man puts in his place, to transact all his business of a particular kind; thus a man usually retains a *factor* to buy and sell all goods, and a *broker* to negotiate all contracts, of a certain description, an *attorney* to transact all his legal business, a *master* (q) to perform all things relating to the usual employment of his ship, and so in other instances. The authority of such an agent to perform all things usual in the line of business in which he is employed, cannot be limited by any private order or direction, not known to the party dealing with him. (r) But the rule is directly the reverse concerning a *particular agent*, i. e. an agent employed specially in one single transaction, for it is the duty of the party dealing with such a one, to ascertain the extent of his authority; and if he do not, he must abide the consequences. (s)

We have seen that a subsequent assent by the principal to his agent's conduct, exonerates the latter from the conse-

(q) The authority of a master is very extensive. See *Rinquest v. Ditchell*, Abb. P. 2. c. 2. *Ellis v. Turner*, 8 T. R. 531. Abb. P. 2. c. 3. He may in foreign parts hypothecate the ship or freight, if that be necessary, in order to raise money for her use, he may for the same purpose hypothecate the cargo. The *Gratitude*, 3 Rob. A. R. 240., nay, if money cannot otherwise be obtained for repairs, may sell a part of it, Abbott, P. 2. c. 3., and may in some cases of extremity dispose even of the ship itself, for the benefit of all concerned. He has moreover, authority over all persons in the ship, in matters relating to her navigation and the preservation of good order on board, and may in case of disobedience or disorder, administer reasonable correction;

his authority in this respect resembling that of a parent over his child, or a master over his apprentice, or scholar. But he must take care that there be a sufficient cause for chastisement, and that the chastisement be reasonable, otherwise he will be punishable. Abbott P. 2. c. 4.

(r) *Whitehead v. Tuckett*, 15 East. 408. *Nickson v. Brohan*, 10 Mod. 109. *Thorold v. Smith*, 11 Mod. 8. See *Daniells v. Adams*, Ambl. 498. *Petties v. Soame*, 13 Vin. Abr. 6. *E. I. C. v. Hensley*, 1 Esp. 111.

(s) *Fenn v. Harrison*, 4 T. R. 177. *Waters v. Brogden*, 1 Y. & J. 457. *Daniell v. Adams*, Ambl. 498. *Clinan v. Cooke*, 1 Sch. & Lef. 22. *Seton v. Slade*, 7 Ves. 276. *E. I. Co. v. Hensley*, 1 Esp. 111.

quences of a departure from his orders. In like manner it will render the principal liable for contracts made in violation of such orders, or even without any previous retainer or employment, for *omnis ratihabitio retrotrahitur et mandato equiparatur.*(*t*) Such an assent may be inferred from the conduct of the principal, (*u*) who cannot confirm a transaction in part, and repudiate it as to the rest, but must either adopt all or none. (*w*)

The general rule however is, that the authority, of whatever description, must be strictly pursued; otherwise the principal, if his agent be a particular one, will not be bound; and if he be a general agent will not be bound save under the circumstances above described, and not under any circumstances whatever, if the third party at the time of his contracting was, or ought to have been, aware of the limited extent of the agent's authority, which is construed by the Courts with a great deal of strictness: (*x*) thus, if given to two, it cannot be executed by one, though the other should die or refuse; and if given to three jointly and severally, it cannot be executed by two, though it may either by all three, or by one only. (*y*) However, the Courts are now disposed to relax from the technical precision of ancient times in construing

(*t*) Ward v. Evans, Sal. 442. Comb. 450. Id. Raym. 930. Maclean v. Dunn, 4 Bingh. 722. Henderson v. Barnwall, 1 Y. & J. 387. Fenn v. Harrison, 4 T. R. 177. Coles v. Trecothick, 9 Ves. 236. 251. 2., but the assent must be given to the act really done by the agent, not to one which he is falsely represented to have done. Horsfall v. Fauntleroy, 10 B. & C. 755.

(*u*) Thorold v. Smith, 11 Mod. 88. Howard v. Baillie, 2 H. B. 618. Wilson v. Poulter, 2 Str. 859. Smith v. Hodgson, 4 T. R. 211. B. N. P. 131.

(*w*) Wilson v. Poulter, 2 Str. 859.

Billon v. Hyde, 1 Atk. 128. Smith v. Hodgson, 4 T. R. 211. Hovil v. Pack, 7 East. 164.

(*x*) Gardiner v. Baillie, 6 T. R. 591. Co. Litt. 258 b. It is said, that if an agent do more than he is authorised, the act is bad for the excess only, provided that can be distinguished; if he do less, bad altogether, except in cases where his authority is coupled with an interest. See Co. Litt. 258 b. Alexander v. Alexander, 2 Ves. 644.

(*y*) Co. Litt. 112 b. 181 b. 1 Rolls Abr. 329. 1 And. 145.

these and the like words, and will search the whole instrument for the maker's intention ;(z) but where that is once ascertained, they will confine the agent to it with the utmost strictness. (a)

At the same time, the Courts are so far liberal in construing authorities given to agents, that they will hold them to include permission to use all necessary, or even usual means, of carrying the main intention of the principal into effect in the best manner ;(b) thus, an agent employed to get a bill discounted may, unless expressly restricted, indorse it in the name of his employer ;(c) and a broker employed to effect a policy of insurance may adjust the loss, and do all that is requisite towards such adjustment. (d)

Such being the general rules concerning an agent's power, let us now consider a little more particularly, what course he must pursue, in order to bind his principal by two or three of the most usual species of engagements.

In executing a deed, he may either sign the name of his principal, (e) or state it to be done by himself as agent for his principal, (f) or by his principal, through him, the agent. (g) But if he sign his own name without mentioning his principal, the latter will not be bound. (h)

(z) *Guthrie v. Armstrong*, 5 B. & A. 628.

(a) *Attwood v. Munnings*, 7 B. & C. 278., an important case, but which cannot be satisfactorily abridged. *Hogg v. Snaith*, 1 Taunt. 347. *Murray v. E. I. Compy.*, 5 B. & A. 204.

(b) *Richardson v. Anderson*, 1 Camp. 43 n. *Goodson v. Brooke*, 4 Camp. 163. *Witherington v. Herring*, 5 Bingh. 442. *Ducarrey v. Gill*, 1 M. & M. 450. *Alexander v. Gibson*, 2 Camp. 555 et notas. *Helyar v. Hawke*, 5 Esp. 75. *Runquist v. Ditchell*, 3 Esp. 65., see *Hicks v. Hankin*, 4 Esp. 116. *Whitehead v. Tuck-*

ett, 15 East. 400. *Ellis v. Turner*, 8 T. R. 531.

(c) *Fenn v. Harrison*, 3 T. R. 757. 4 T. R. 177.

(d) *Richardson v. Anderson*, 1 Camp. 43 n.

(e) 9 Co. 76. 77. *Moor pl.* 1106. 1 Str. 705. *Wilks v. Back*, 2 East. 142.

(f) 9 Co. 77. *Parker v. Kett*, Sal. 95.

(g) *Wilks v. Back*, 2 East, 142. per. Grose J.

(h) 9 Co. 76. 77. *D'Abridgcourt v. Ashley*, *Moor.* 818. See 1 Str. 705.

In like manner, an agent employed to draw, indorse, or accept negotiable instruments, must take care not to do so in his own name, for if he do, his principal will not be bound, but he will himself be liable to the holder.

As to his power to bind the principal by a disposition of his goods, the common law rule was, as may be collected from the foregoing observations, that to acquire a good title to the employer's property by purchasing it from his agent, such purchase must have been either in market overt, and without knowledge of the seller's representative capacity, or from an agent acting according to his instructions, or from one acting in the usual course of his employment, and whom the buyer did not know to be transgressing his instructions. (i) The reason of this is clear, for unless the transaction took place *bonâ fide* in a market overt (in which case, a peculiar rule of law steps in for its protection), (j) an agent selling without *express* authority, must, that his act might be supported, have sold under an *implied* one. But we have seen that an *implied* authority always empowers the person authorised to act in *the usual course* of his employment, consequently, if he sold in an *unusual* mode, he could have no *implied* authority to support his act, and as he had no *express* one, his sale of course fell to the ground. For instance, the *usual* employment of a factor being to *sell*, it was repeatedly decided that he could not *pledge* the goods entrusted to him. (k)

Such was the rule of the common law, but being con-

Wilks v. Back, 2 East. 142. Bacon v. Dubarry, 1 Lord Raym. 246. Sal. 70. 12 Mod. 129.

(i) Vide 12 Mod. 514. Wiltshire v. Sims, 1 Camp. 258. Newsom v. Thornton, 6 East. 17. M'Combie v. Davies, 6 East. 538. De Bouchot v. Goldsmid, 5 Ves. jun. 211.

(j) See Book 3. cap. Contracts of Sale.

(k) Paterson v. Tash, 2 Str. 1182. Daubigny v. Duval, 5 T. R. 606. De Bouchot v. Goldsmid, 5 Ves. jun. 211. See Pickering v. Busk, 15 East. 44. Martini v. Coles, 1 M. & S. 140. Shipley v. Kymer, 1 M. & S. 484. Tolley v. Rathbone, 2 M. & S. 298. Cochran v. Irlam, ibid. 301. Williams v. Barton, 3 Bing. 139. Duclos v. Ryland, 5 Moore. 418. n.

sidered prejudicial to credit by the greater number of mercantile men, it was altered by Statute 4 G. 4. cap. 83., and afterwards by the amended Act of 6 G. 4. cap. 94., usually called "The Factor's Act," and whence the law on this subject must now be collected.

By this statute the person (*l*) in whose name goods are shipped is to be deemed the true owner thereof, so far as to entitle the consignee to a lien thereon, in respect of any money or negotiable security advanced by him to such person, or received by such person to his use, if he has not notice by the bill of lading or otherwise, at or before the advance or receipt that such person is not the actual and *bonâ fide* owner of the goods, and such person shall be taken for the purposes of this Act to have been entrusted with the goods for the purpose of consignment or of sale, unless the contrary be made to appear.

A person (*m*) entrusted with, and in possession of any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, wharfinger's certificate, warrant, or order for delivery of goods, shall be deemed to be the true owner of the goods described in the said several documents, so far as to give validity to any contract or agreement made by him for the sale or disposition (*n*) of the goods, or any part thereof, or the deposit or pledge thereof, or any part thereof, as a security for any money or *negotiable instrument*, (*o*) if the buyer, disponent, or pawnee, has not notice by the document, or *otherwise*, (*p*) that such person is not the actual and *bonâ fide* owner of the goods.

(*l*) Sect. 1.

(*m*) Sect. 2.

(*n*) A disposition must be something in the nature of a sale. *Taylor v. Kymer*, 3 B. & Ad. 337. *Taylor v. Trueman*, 1 M. & M. 457.

(*o*) India warrants are not negotiable instruments within this section, *ibid*.

A party seeking to avail himself of the 2d section must produce the contract or agreement to which he wishes to give validity if it be in writing. *Evans v. Trueman*, 2 B. & Ad. 886. 2 M. & M. 10.

(*p*) This word is said to have been introduced by Ld. Eldon in committee,

But if such person (*q*) deposit or pledge the goods as a security *for a pre-existing debt or demand*, he who so takes the deposit or pledge, without notice, shall acquire such right, title, or interest, and no further, or other, than was possessed by the person making the deposit or pledge.

Any (*r*) person (*s*) may contract for the purchase of goods with any agent *entrusted with the goods*, or to whom they may be consigned, and receive and pay for the same to the agent, notwithstanding he shall have notice that the party with whom he contracts is a factor or agent; if such contract and payment be made in the ordinary and usual course of business, and he has not at the time of the contract or payment notice that the agent is not authorised to sell or to receive the price.

Any (*t*) person may accept any goods or any such document as aforesaid, on deposit or pledge (*u*) from any factor or agent *notwithstanding he shall have notice* that the party is a factor or agent; but in such case, he shall acquire such right, title, or interest, and no farther, or other, than was possessed by the factor or agent, at the time of the deposit or pledge. (*w*)

It is further provided (*x*) that this Act shall not prevent the true owner of the goods from recovering them from his factor or agent, before a sale, deposit, or pledge, or from the assignees of such factor or agent in the event of his bankruptcy;

on the question, What is such notice? Vide *Evans v. Trueman*, 2 M. & M. 10.

(*q*) Sect. 3.

(*r*) Sect. 4.

(*s*) In *Monk v. Wittenbury*, 2 B. & Ad. 484. the Court said "It is difficult to say what is meant in this section by 'an agent entrusted with goods;' but we are clearly of opinion that a wharfinger is not such a person."

(*t*) Sect. 5.

(*u*) The words "as a security for any money or negotiable instrument," used

in Sect 2. are not found here. A fraudulent sale cannot be upheld as a pledge within the meaning of this Section. *Thompson v. Farmer*, 1 M. & M. 48.

(*w*) And therefore if the agent's interest in the thing pledged, be liable to be defeated by the performance of a condition, so will the pledgee's. *Blandy v. Allen, Dans. & Lloyd*. 22. *Fletcher v. Heath*, 7 B. & C. 517.

(*x*) Sect. 6.

nor from the buyer the price of the goods, subject to any right of set-off on the part of the buyer against the factor or agent; nor from recovering the goods deposited or pledged upon repayment of the money, or restoration of the negotiable instrument, advanced on the security thereof to the factor or agent; and upon payment of such further money, or restoration of such other negotiable instrument (if any) as may have been advanced by the factor or agent to the owner, or on payment of money equal to the amount of such instrument; nor from recovering from any person any balance remaining in his hands as the produce of a sale of the goods, after deducting the money or negotiable instrument advanced on the security thereof: and in case of the bankruptcy of the factor or agent, the owner of the goods so pledged and redeemed, shall be held to have discharged *pro tanto* his debt to the estate of the bankrupt.

When an agent having a proper authority, purchases in the name of his principal, it is clear from what has been said, that the principal is bound to the vendor; if, however, the vendor, preferring the credit of the agent to that of the principal, agree with the former to accept him as his debtor instead of the latter, he cannot afterwards alter his election, turn round, and charge the principal. (*y*) But it often happens, that a broker purchases in his own name, without disclosing that he has any principal; where this takes place, the broker is of course the person to whom the vendor gives credit; yet, if he afterwards discover the principal, he may elect to abandon the responsibility of his broker, and charge him: (*z*) and so he may, it seems, if the broker, on making the purchase, stated himself to be an agent, but omitted to state the name of his principal, which is afterwards discovered: (*a*) unless

(*y*) *Patterson v. Gandasequi*, 15 East.
62. *Addison v. Gandasequi*, 4 Taunt.
574.

(*z*) *Railton v. Hodgson*, 4 Taunt. 576
n. *Wilson v. Hart*, 7 Taunt. 295.

(*a*) *Thomson v. Davenport*, 9 B. &
C. 78.

in either of these cases, the seller have suffered the time for payment to elapse, and the principal to alter the state of his account with the broker in such a manner that he would be a loser if called on to pay to the seller, (b) for then, indeed, sooner than that the principal should be injured, the seller will be taken to have selected the agent for his debtor. (c) But if the time for payment have not elapsed, the principal cannot, by prematurely settling with his agent, deprive the seller of his election. (d) It seems also to be a rule that whenever the agent is an English, and the principal a foreign merchant, the seller will be considered as having given credit to the Englishman, and that he and not the foreigner is liable. (e)

Though the foregoing observations chiefly refer to contracts, the principal will be equally bound by any act done by the agent in the course of his employment, and with reference to the object of it: for a man cannot depute another to transact his business and refuse to be responsible for his conduct in transacting it. Therefore the representation of the agent about the subject matter of a contract, which he is negotiating for his principal, will, if made *during the course of that negotiation*, bind the latter; (f) but it must be made *during, and in the course of, the negotiation*, while the agent is actually representing his principal therein, for if made at any other time it has no more effect than that of a mere stranger. (g) So also the suppression or misrepresentation by an agent of a material fact vitiates an insurance, although that fact may have been known only to him, not to his principal; (h) for

(b) For instances in which such alterations in the account have become material, see *Robinson v. Read*, 9 B. & C. 449. *Wyatt v. Marquis of Hertford*, 2 East. 147.

(c) See *Thompson v. Davenport*. *Kymer v. Suwercropp*, 1 Camp. 109.

(d) *Kymer v. Suwercropp*, 1 Camp. 109.

(e) *Patterson v. Gandasequi*. *Thomson v. Davenport*.

(f) *Peto v. Hague*, 5 Esp. 135. *Phill. on Ev.*, 7th ed. vol. 1. p. 99.

(g) *Phill. on Ev.*, ubi supra. *Dawson v. Atty*, 7 East. 367. *Snowball v. Goodricke*, 4 B. & Ad. 543.

(h) *Fitzherbert v. Mather*, 1 T. R. 12. See *Seaman v. Fonnereau*, Str. 1183.

notice to the agent is considered in law notice to the principal, who is taken to know every thing about a transaction that his agent in it knows. (i) And as the agent's representation binds the principal, so is the former's admission of a fact evidence against the latter of its truth. *(k)* But the admission must, like the representation, concern a matter in which the agent is employed to act for his principal, and must be made during, and in the course of such employment; *(l)* to use the words of Gibbs J., in *Langhorn v. Alnutt*, "where it is proved that A. is agent for B., whatever A. does or says, or writes in the making of a contract as agent for B. is admissible in evidence, because it is part of the contract which he makes for B., and therefore binds B., but it is not admissible as his account of what passes."

Payment to an agent in the course of his employment, is payment to the principal; (m) but it is not in the course of a broker's business to receive payment for goods, the sale of which he has negotiated; *(n)* unless he be acting for an undisclosed principal. *(o)* An insurance broker has a right to receive payment of a loss, but only in money; he must not set it off against his own debt to the underwriter; *(p)* for "it

Roberts v. Fonnereau, Beawes 266. *Edwards v. Footner*, 1 Camp. 530. *Fillis v. Barton*, Park. 182.

(i) *Cowen v. Simpson*, 1 Esp. 290. *Brotherton v. Hall*, Vernon, 574. *Jennings v. Moore*, 2 Ves. 609. See also *Ambl.* 438. *Sheldon v. Cox*, 2 Eden, 224. *Doe v. Martin*, 4 T. R. 66. *Toulmin v. Steer*, 3 Meriv. 210.

(k) *Harding v. Carter*, Park. 4. *Palethorp v. Furnish*, 2 Esp. 211. *Anderson v. Sanderson*, 2 Stark. 204. *Gregory v. Parker*, 1 Camp. 394. *Clifford v. Barton*, 1 Bingham. 199.

(l) *Fairlie v. Hastings*, 10 Ves. jun. 123. *Langhorn v. Alnutt*, 4 Taunt. 511. *Kalh v. Johnson*, *ibid.* 565. See Garth

v. Howard, 8 Bingham. 451. *Snowball v. Goodricke*, 4 B. & Ad. 543.

(m) *Favenc v. Bennett*, 11 East. 38. See 6 G. 4. c. 94. s. 4. ante, p. 64.; and where an agent has a right to receive payment, a tender thereof to him is a tender to his principal. *Goodland v. Blewith*, 1 Camp. 477. *Muffatt v. Parsons*, 1 Marsh. 55. 5 Taunt. 307.

(n) *Baring v. Corrie*, 2 B. & A. 137. *Blackburn v. Scholes*, 2 Camp. 343.

(o) *Blackburn v. Scholes*.

(p) *Todd v. Reid*, 4 B. & A. 210. *Russell v. Bangley*, *ib.* 395. *Bartlett v. Pentland*, 10 B. & C. 760. *Scott v. Irving*, 1 B. & Ad. 605.

is a general rule of law, that if a creditor employ an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal; but if the agent instead of receiving money, write off money due from him to the debtor, then the latter is not discharged.”(q) Where however the usual course of trade warrants the receipt of a check, note, or bill, payment in that way to an agent will discharge the debtor, unless indeed the agent be a particular one, and such a course be inconsistent with his instructions;(r) the payment, in order to be good, must be specifically appropriated to the debt not made upon a general account.(s) A *factor* is by the nature of his employment, authorised to receive payment for the goods of which he disposes, yet a payment even to him will not exonerate a debtor who has received *express notice* from the creditor not to pay to his factor.(t) However, if the creditor be indebted on the balance of account to the factor, the debtor will be exonerated by a payment to the latter; for a factor has, as we shall see in the Fourth Book, a lien for the general balance of his account upon the price of goods which he has sold.(u)

When money is due upon a written security, such as a bill or bond, it is the duty of the debtor, if he pay to an agent, to see that such agent is in possession of the security, for otherwise he will not be discharged unless the money reach the principal; not even though the agent to whom he pays may have been usually employed to receive money,(v) for his non-production of the security rebuts the implication of authority arising from such his employment.

As payment to an authorised agent is payment to his prin-

(q) Per Abbott L. C. J., in *Russell v. Bangley*, 4 B. & A. 395.

(r) *Thorold v. Smith*, 11 Mod. 71.
88. *Ward v. Evans*, 2 L. Raym. 930.
2 Sal. 442.

(s) See *Bartlett v. Pentland*, ubi sup.

(t) *Mann v. Forester*, 4 Camp. 60.
B. N. P. 130.

(u) *Drinkwater v. Goodwin*, Cowp. 251. *Hudson v. Granger*, 5 B. & A. 27.

(v) *Hen v. Caisby*, 1 Cha. Ca. 93
n. *Gerard v. Baker*, 1 Cha. Ca. 94. D.
of *Cleveland v. Dashwood*, 2 Eq. Ca.
Ab. 709. *Wostenholme v. Davies*, 2
Freem. 289.

cipal, so a delivery to the former is a delivery to the latter; thus, a delivery of goods to a carrier's servant, is a delivery of them to the carrier; all these instances, and many others, only exemplify that general maxim upon which the whole law of principal and agent hinges, *Qui facit per alium facit per se*.

Hitherto we have only considered the responsibility of the principal to third parties, in consequence of *contracts*, and acts connected with such contracts. But he is also liable, and that to a considerable extent, for *wrongs* committed by his agent while engaged in his service. He will of course be so in every instance in which he has expressly commanded the wrong to be done, or given orders which could be executed only by its commission; (*w*) and there are many instances in which it requires no express command to make him answerable.

Thus he is responsible for the *negligence* of his agent, acting in the prosecution of his business, though not under his immediate direction; as if one of his servants lame a customer's horse in shoeing him, or drive his master's carriage so unskilfully, that it injures the person or property of a stranger: innumerable other cases might be put illustrating the general principle, (*x*) which seems to extend so far, as to make the employer responsible, at least in most cases, not only for the act of his immediate agent, but for that of a sub-agent employed by him. Thus, where A. employed B. to repair his house, B. contracted with C. to do the work, and C. with D. to furnish the materials, which D.'s servant carelessly left on the road, and thereby caused an injury to the plaintiff, it was held that A. was answerable for the mischief. (*y*)

(*w*) Gregory v. Piper, 9 B. & C. 591.

(*x*) Brucker v. Fromont, 6 T. R. 659. See 1 Raym. 739. Hurry v. Rickman, 2 M. & M. 126. Leslie v. Pounds, 4 Taunt. 649. Weyland v. Elkins, Holt 227. 1 Stark. 272.

(*y*) Bush v. Steinman, 1 B. & P. 409. Matthews v. West Midd. W. W.

Compy., 3 Camp. 403. Harris v. Baker, 4 M. & S. 27. Weyland v. Elkins, *supr*. See the great case of Laughner v. Pointer, 5 B. & C. 547., in which the Court of K. B. was equally divided, and all the authorities and arguments pro and con fully discussed; it was a case in which the defendant hired job horses and a coachman from a livery-stable keeper to draw

But though the employer is answerable for the *negligence* of his agent while engaged in his service, yet he is not so for his wilful and malicious trespass; thus, if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce the accident, the master is not liable, though if intending to effect his master's orders, he strike, but injudiciously, and to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment. (z)

The principal appears to be responsible, not merely for the negligence, but for the deliberate fraud of his agent committed in the execution of his employment, though without the principal's authority; as for instance, by selling false jewels for true ones; the reason given for this by Lord C. J. Holt appears a sensible one; "seeing," says he, "that some one

his own carriage, and the coachman, who was selected and paid by the livery-stable keeper, drove the carriage against the plaintiff's horse. Abbott C. J. and Little-dale J. who held the defendant liable, distinguished *Bush v. Steinman*, on the ground that the tort there happened in the course of an operation on the plaintiff's real property, and was therefore in the nature of a nuisance; and asked whether the employer of a hackney-coachman, or a waterman, or the hirer of post-horses, would be liable for injuries done thereby. Bayley J. and Holroyd J. *contra*, conceded, that the employer would in those cases be irresponsible, but distinguished them by founding such irresponsibility on usage and the public nature of those employments.

(z) *Croft v. Alison*, 4 B. & A. 590. *M'Manus v. Crickett*, 1 East. 106. It may be remarked, that there is an ex-

ception in the case of some public officers, such as the postmaster-general, commissioners of customs and excise, auditors of the exchequer, &c. who are not liable for the acts of their inferior officers, nor is the captain of a man-of-war responsible for the misconduct of the lieutenant, if there is none on his own side. *Nicholson v. Mounsey*, 15 East. 384. *Lane v. Cotton*, 1 Ld. Raym. 646. Com. 100. *Whitfield v. Lord Le Despencer*, Cowp. 754. See St. de Scaccario, 51 H. 3. st 5. ss. 7 & 8., & St. 21 E. 3. c. 21. de prodictionibus; but this exemption does not extend to the *private* agents of such public officers, Dy. 161. 3 Mod. 323. nor to sheriffs, 2 Esp. 507. Roll. Ab. 92. pl. 2 & 3. Owners and masters of ships obliged by statute to employ licensed pilots, are exonerated from responsibility for their conduct. 6 G. 4. c. 125.

must be a loser by the deceit, it is more reasonable that he who employs and confides in the deceiver, should be the loser, than a stranger." (a)

In general, the principal is not *criminally* responsible for the act of his agent, unless he expressly commanded it. (b) However, in a case of indictment for libel, it was held, that the person who derived profit from, and furnished the means of carrying on, a newspaper, entrusting the publication to one whom he selected, and in whom he confided, would be criminally answerable for what appeared therein, though it could not be shewn that he was concerned in the individual publication; (c) so in informations for breaches of the revenue laws: the employment of an agent in the defendant's usual course of business, has been held sufficient *evidence* to be left to a jury, who may if they think fit, thence *presume*, that such agent was authorised to do the prohibited act, with which it is sought to charge his principal. (d)

Our last enquiry under this head is, how the agent's power to commit his principal to third parties may be determined. It will be so of course by the revocation of his authority, which is in general determinable at will, (e) unless coupled with

(a) See the observations of Bayley B. in *Att. G. v. Siddon*, 1 Tyrwh. R. 46, 47. *Hern v. Nicholls*, 1 Sal. 289. Vide etiam *Grammar v. Nixon*, 1 Str. 653. *Crockford v. Winter*, 1 Camp. 127. per Lord Ellenborough. *Southern v. How*, *Bridgman*, 126, 7. 2 Moll. 330. *Cro. Jac.* 468. *Rex v. Bower*, *Cowp.* 323., see however 9 H. 6. 53 b. cited in *Bro. Abr.* *Action sur le case*, where *per curiam*, "If my servant sell false stuff, an action on the case does not lie against me, unless he sold it through my covin, or by my command."

(b) 2 Str. 885. per Raym. C. J. *Lamb's Ca.* 9 Co. 59.

(c) *Rex v. Gutch*, 1 M. & M. 437.

See *R. v. Almon*, 2 Burr. 2686. *R. v. Dixon*, 3 M. & S. 11., the rule however appears to be, both in these cases and that of a revenue information below mentioned, to be one merely of *evidence*; an exemption from which may be established by rebutting the presumption of authority arising from usual employment. See *R. v. Gutch*, 1 M. & M. 438.

(d) *Att. G. v. Seddon*, 1 Tyrwh. R. 41. *Att. G. v. Riddell*, 2 Tyrwh. 523. See also *Att. G. v. Burges*, *Bunb.* 223.

(e) *Farmer v. Robinson*, 2 Camp. 339, n. *Warwick v. Slade*, 3 Camp. 127. *Bristow v. Taylor*, 2 Stark. 50.

an interest, or given for valuable consideration, as in the case of a power of attorney given by way of security to a creditor. (*f*) It will be revoked also by the death of the principal, (*g*) and that even though coupled with an interest; "for how," says Lord Ellenborough, "can a valid act be done in the name of a dead man?" (*h*) or by his bankruptcy, except in certain cases, in which the interest of the creditors cannot be affected, and the power is one, which in conscience ought to be exercised; as where the vendor of a ship at sea, executed a power to indorse the transfer on her certificate, and then became bankrupt, the power was held not revoked by the bankruptcy. (*i*) As to the implied authority arising from previous employment, that can, as we have seen, be determined only by rendering it notorious to the world in general, or to the particular person who relies on it that such employment has been put an end to; (*k*) and if a particular agent were to contract after the revocation of his authority, but before the revocation had been made known to him, there seems little doubt that persons who had dealt upon the faith of it, would not be permitted to suffer. (*l*) When an agent has completed his task, his authority of course determines: thus, an auctioneer when he has sold is *functus officio*, and has no right to treat about the mode of making out a title. (*m*.)

(*f*) Walsh v. Whitcombe, 2 Esp. 565. Bromley v. Holland, 7 Ves. 28.

(*g*) Bac. Abr. Authority E. Co. Litt. 52. b.

(*h*) Watson v. King, 4 Camp. 272. See Lepard v. Vernon, 2 V. & B. 51.

(*i*) Dixon v. Ewart, 3 Meriv. 322.

Buck. 94.

(*k*) Hazard v. Treadwell, Str. 506.

— v. Harrison, 12 Mod. 346.

(*l*) See the remarks of Buller J. in Salte v. Field, 5 T. R. 215.

(*m*) Seton v. Slade, 7 Ves. 276. See Dickenson v. Lilwall, 4 Camp. 279.

SECTION V.—*Rights of the Principal against third parties.*

As the principal is bound by the acts and contracts of his authorised agent, so he may take advantage of them ; (n) and if one person *contract* even without authority, in the name of another, that other, though he may repudiate the contract, may, if he think fit, adopt and enforce it. (o) But then he must adopt it altogether ; he cannot ratify what is beneficial to himself, and reject the remainder. (p) And there is a difference between his right to adopt, a contract, and a bare act, the effect of which would be to raise a duty towards him from a third party, and subject that third party to damage for its non-performance. Such an act can never, if unauthorised at first, be confirmed by any recognition *ex post facto* ; thus, a demand of payment, in order to oust the debtor's plea of tender, or a demand of property, in order to found an action of trover, must be made by an agent *previously* authorised ; (q) and the same doctrine seems to apply to a notice to quit, notwithstanding the cases of *Roe v. Pearce*, 2 Camp. 96., and *Goodtitle v. Woodward*, 3 B. & A. 689., which latter may be supported on another ground, (vide *Doe v. Sumersett*, 1 B. & Ad. 135.,) for in *Doe v. Walters*, 10 B. & C. 626., the judges, particularly Littledale J., appeared to think a subsequent adoption of such notice insufficient : where a *previous* authority is requisite, it seems that the person whom it is to affect, may require to be properly satisfied of its existence, and is not bound to take the agent's bare assertion. (r) In other instances, where no duty is to be raised on the part of a third

(n) *Seignior v. Walmer*, Godb. 360.(o) *Routh v. Thompson*, 13 East. 274.*Hagedorn v. Oliverson*, 2 M. & S. 485.(p) *Wilson v. Poulter*, 2 Str. 859.*Billon v. Hyde*, 1 Atk. 128. *Smith v.**Hodgson*, 4 T. R. 211. B. N. P. 131.(q) *Coore v. Callaway*, 1 Esp. 115.*Coles v. Bell*, 1 Camp. 478. *Solomons**v. Dawes*, 1 Esp. 83. See *Bartram v.**Farebrother*, 5 Bingh. 579.(r) *Solomons v. Dawes*, 1 Esp. 83.See *Roe v. Davies*, 7 East. 363.

person, an adoption *ex post facto* is generally sufficient; *ex gr.* of an entry to avoid a fine. (s)

The principal's right to enforce contracts made by his agent is subject to this rule, *viz.* that if the agent have been allowed to deal in his own name, the party dealing with him will enjoy the same rights against the employer, as he might have exercised against his agent had that agent really been a principal. (t) Thus, when a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes the principal; and though the real principal may appear, and bring an action on that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor, in answer to the demand of the principal. (u) This rule is to prevent the hardship under which a purchaser would labour, if, after having been induced by peculiar considerations, such for instance, as the consciousness of possessing a set-off, to deal with one man, he could be turned over and made liable to another to whom those considerations would not apply, and with whom he would not willingly have contracted. But if at any time in the course of the transaction he have means of knowing that the person with whom he deals is not a principal, the above reason does not apply, and then *cessante ratione cessat ipsa lex.* (w) Thus, though if a *factor* sell goods in his own name, the buyer may avail himself of a right of set-off against the factor; yet if a *broker* do so, the rule will, except under extraordinary circumstances, be different; for a *factor* who has the possession of goods, differs materially from

(s) Co. Litt. 258 a.

(t) Coates v. Lewis, 1 Camp. 444.

(u) Stracy v. Decy, 7 T. R. 361.
George v. Claggett, 7 T. R. 359. et
notas. Blackburne v. Scholes, 2 Camp.
343. Carr v. Hinchcliff, 4 B. & C.

551. Taylor v. Kymer, 3 B. & Ad.
334.

(w) Maans v. Henderson, 1 East.
335. Moore v. Clementson, 2 Camp. 24.
Escott v. Milward, 7 T. R. 361.

a *broker*; the *factor* is a person to whom goods are consigned, and when he sells in his own name, it is within the scope of his authority, and it is right, therefore, that his principal should be bound by the consequences of such sale, one of which is the right of setting off a debt due from the *factor*: but the case of a *broker* is different, he has not the possession of the goods, and so the vendee cannot be deceived by that circumstance, and besides, the employing a person to sell goods as a *broker* does not authorise him to sell in his own name; if therefore he sell in his own name, he acts beyond the scope of his authority, and his principal will not be bound; if it be said, that by these means the *broker* would be enabled by his principal to deceive innocent persons, the answer is obvious, that cannot be so, unless the principal deliver to him the possession and indicia of property. (x)

We have seen that payment or delivery to an agent, is payment or delivery to his principal; this holds good *vice versâ*, (y) and therefore where the agent has paid away or delivered over his master's property, on a consideration which fails, or otherwise under circumstances which would entitle him to recover it; the master may, if he please, maintain an action in his own name to be reimbursed, (z) which it will often be advisable to do, in order not to lose the agent's evidence; and in some cases the master may sue for this purpose where the agent could not; for instance, if the agent and a third person have joined in applying his property to an illegal purpose, as to the insurance of lottery tickets; for though the agent being *particeps criminis*, (a) might not be able to recover, on account of the rule *pari delicto potior est conditio defendentis*; yet that rule does not affect the master who is guilty of no

(x) *Baring v. Corrie*, 2 B. & A. 137.

(y) *Coare v. Giblett*, 4 East. 85.

(z) *D. of Norfolk v. Worsley*, 1 Camp. 389. *Ancher v. B. of England*, Dougl. 637. *Stevenson v. Mortimer*, Cowp. 805.

(a) There is no doubt of this position, if the agent can be looked on as *particeps criminis*, and he was considered such in *Clarke v. Shee*; but see *Jaques v. Gollightly*, 2 Bl. 1073.

criminality. (b) And where the agent disposes of the master's property, without either an express or an implied authority; as if he sell his master's goods on credit, in a trade the usual course of which is to sell only for cash, the master, though he may affirm the transaction, may if he please repudiate it, and recover the property thus tortiously disposed of from the disponent. (c)

The establishment of the principal's rights against third parties, is facilitated by that rule of evidence, which renders the agent a competent witness in his favour: (d) this was long since established, as an exception, *ex necessitate*, to the general canon, that a witness having any interest in the event of the cause was incompetent, qualified now in other cases, by stat. 3 & 4 W. 4. c. 42. s. 26.

SECTION VI.—*Mutual Rights of Agents and third Parties.—* *Rights of Agents against third Parties.*

A factor or other agent, who has made a contract, in the subject matter of which he has a special property, may maintain an action thereon in his own name, and that whether he professed to contract for himself or not; (e) thus, an auctioneer may sue in his own name, for the price of goods sold by him on the owner's premises, and known to be his property. (f)

(b) *Clarke v. Shee*, Cowp. 197.

(c) 12 Mod. 514. *Wiltshire v. Sims*, 1 Camp. 258. *Guerreiro v. Peile*, 3 B. & A. 616.

(d) *Mason v. Hogsden*, 11 Mod. 226. 262. *Dixon v. Cooper*, Wils. 40. *Benjamin v. Porteus*, 2 H. Bl. 591. *Buckmaster v. Harrop*, 4 Ves. 474. *Martin v. Horrell*, Str. 647. *Barker v. M'Crae*, Camp. 144. B. N. P. 289. See however respecting the limits of this rule, which

does not include agents acting out of their usual employment, or agents for one particular transaction, *M'Brain v. Fortune*, 3 Camp. 317. *Green v. New River Co.* 4 T. R. 589. *Edmonds v. Lowe*, 8 B. & C. 408.

(e) 1 Atk. 248. 2 Esp. 493. B. N. P. 130. *Williams v. Millington*, 1 H. Bl. 81. *Sadler v. Leigh*, 4 Camp. 195.

(f) *Williams v. Millington*,

So, if an agent have transferred his master's property, under circumstances which give a right to recover it back, he may do so in his own name; though we have seen that it may also be recovered in that of his principal. (g) So he may maintain actions of tort for injuries done to it while in his possession. (h) In the above instances, he sues as a trustee for his principal; but there are others in which he may proceed for his own benefit; thus, a factor who has a lien for his balance on the price of goods sold by him, may maintain an action for that price against the buyer; and if he have previously given him notice not to pay to his principal, it has been thought that payment to the principal would not be a defence to such an action, (i) though without notice it would be so; (k) and in such a case, Eyre L. C. J. refused to allow the defendant to set off money due to him from the principal. (l) There are, however, cases in which great hardships might result, if such a set-off were not allowed. (m)

SECTION VII.—*Rights of third Parties against the Agent.*

An agent contracting as such for a known and responsible employer, incurs no personal liability to third parties. (n) If the individual with whom he contracted knew him to be an agent, knew his principal, and knew that he intended to bind that principal, he will be taken to have trusted to the credit of the principal, and the agent will not be bound. There is one exception to this rule, viz. the case of masters of ships,

(g) Per Lord Mansfield, *Stevenson v. Mortimer*, Cowp. 805.

(h) 1 H. Bl. 81. *Joseph v. Knox*, 3 Camp. 320.

(i) *Drinkwater v. Goodwin*, Cowp. 255.

(k) *Coppin v. Walker*, 7 Taunt. 237.

(l) *Atkyn v. Amber*, 2 Esp. 493. See

Lord Mansfield's judgment in *Drinkwater v. Goodwin*, Cowp. 256.

(m) See the observations of Eyre C. J. in *Atkyn v. Amber*, and see *Coppin v. Craig*, 7 Taunt. 243.

(n) *Exp. Hartop*, 12 Ves. 352. *Owen v. Gooch*, 2 Esp. 567. *Graham v. Stamper*, 2 Vern. 146.

who are responsible as well as their owners, on contracts for repairs, or stores, or loans of money for those purposes; (o) yet even in that case, if there be circumstances which show that the owners alone were trusted, they alone will be responsible. (p) An agent may however bind himself by an express undertaking; (q) and if he contract, without naming any principal, he is himself the person *primâ facie* responsible; and though the other party may in most cases elect to charge the employer on discovering him, yet he need not do so, but may if he please, continue to look to the agent; (r) and the rule is the same, at least, as far as the agent's liability is concerned, where at the time of contracting, he states himself to be an agent, but does not disclose his principal. (s) As this subject has been discussed in a previous section, it is better to refer to it for further detail, than to fatigue the reader with a repetition of the authorities there cited. (t) It has also been mentioned, (u) that where a British agent contracts for a foreign principal, the British agent is responsible: (w) this is said to be for the benefit of trade, or is perhaps a branch of the following general rule, *viz.* that where there is no responsible employer, the agent shall be held personally liable; thus, where A. agreed with B. and C. to pave the streets of Putney, and they on behalf of the parish, agreed to pay him, they were

(o) Rich v. Coe, Cowp. 636. See Morse v. Sluice, 1 Vent. 190. 238. 1 Mod. 85. 2 Lev. 69.

(p) Hoskins v. Slayton, Ca. Tem. Hardw. 376.

(q) See Appleton v. Binks, 5 East. 148. Cass v. Rudell, 2 Vern. 280. Benson v. Hippins, 4 Bingh. 455. Redhead v. Cator, 1 Star. 14. Morris v. Stacey, Holt. 153. Talbot v. Godbolt, Yelv. 137. Haines v. French, Aleyn, 6. Kennedy v. Gouveia, 3 D. & R. 503. Scrace v. Whittington, 2 B. & C. 11. Kendray v. Hodson, 5 Esp. 228.

(r) See Morgan v. Corder, Paley, 372.

(s) Hanson v. Roberdeau, Peake 120. Thomson v. Davenport, 9 B. & C. 78.

(t) Ante, sect. 4. pp. 65, 66., and Paterson v. Gandasequi, 15 East. 62. Thompson v. Davenport, 9 B. & C. 78., and Lord Kenyon's judgment in Owen v. Gooch, 2 Esp. 567.

(u) Ibid.

(w) De Gaillon v. L'Aigle, 1 B. & P. 368. Paterson v. Gandasequi, 15 East. 62. Thomson v. Davenport, 9 B. & C. 78. Houghton v. Matthews, 3 B. & P. 490. B.N.P. 130.

held personally responsible. (x) There is an exception to this rule, in favour of government officers acting for the public ; (y) and possibly this exception may extend to all *public* officers acting as such. (z) The rule itself seems to be one of evidence, and all cases falling under it to be reducible to the question, *To whom was credit given?* For it seems, on the one hand, that if a party choose to give credit to irresponsible persons of any description, acting by their agent, and it be manifestly intended that the agent's credit shall not be pledged, in such a case the agent will not be responsible ; (a) while on the other hand it is clear, that if the agent contract for an irresponsible employer, a strong presumption will arise, that he meant to pledge his own credit, and that the party dealing with him meant to accept it, unless indeed he be a government or public officer, acting in his public capacity.

We have seen that the agent will be personally liable, where he has expressly undertaken to be so. It is sometimes difficult to determine whether upon the true construction of an agreement, the agent making it, intended to bind himself or his principal. The nature of these difficulties will be best illustrated by two examples. In *Appleton v. Binks*, (b) a man covenanted for himself, his heirs, &c., for and on the part and behalf of J. S., to do a certain act ; and it was held that he, and not J. S., was answerable for its non-performance. On the other hand, in *Spittle v. Lavender*, (c) Lavender en-

(x) *Myriel v. Hymensold*, Hard. 205. See *Horsley v. Bell*, Ambl. 770. 1 Bro. Cha. Ca. 101. *Eaton v. Bell*, 5 B. & A. 33. Anon. 12 Mod. 559. *Burls v. Smith*, 7 Bing. 705.

(y) *M'Beath v. Haldimand*, 1 T. R. 172. *Unwin v. Wolseley*, ibid. 674. *Myrtle v. Beaver*, 1 East. 134.

(z) See 1 T. R. 182. per Buller J., *Bowen v. Morris*, 2 Taunt. 374.

(a) See *Hoskins v. Slayton*, Ca. tem. Hardwicke, 376.

(b) 5 East. 148. See *Cass v. Rudell*,

2 Vern. 280. *Kennedy v. Gouveia*, 3 D. & R. 503. *Talbot v. Godbolt*, Yelv. 137. *Haines v. French*, Aleyn, 6. *Clayhill v. Fitzgerald*, 1 Wils. 28. 58. *Bacon v. Dubarry*, 1 Ld. Raym. 246. 1 Sal. 70. *Norton v. Herron*, Ry. & M. 229. *Burrel v. Jones*, 3 B. & A. 47. *Iveson v. Conington*, 1 B. & C. 160. *Hall v. Ashurst*, 1 Cr. & Mee. 717.

(c) 2 B. & B. 452. See *Hartop v. Jukes*, 2 M. & S. 438. *Hart v. White*, Holt, 76.

tered into an agreement, as agent for, and on the part and behalf of S. R., and signed it, at the foot of which agreement were these words: "I hereby sanction this agreement, and approve of Charles Lavender having entered into it on my behalf," and it was held that Lavender was not responsible.

If the agent exceed his authority, so that his principal is not bound, he will himself be liable for the damage thus occasioned to the other contracting party, although he may have been innocent of my intention to defraud. (*d*)

The question, whether an agent is personally liable for money paid to him for the use of his principal, under circumstances which would entitle some person to recover it from that principal, involves much difficulty. In the first place, it is clear that if the agent have, without notice to act otherwise, paid over the money to his principal, he never can be called on to refund it. (*e*) But in *Cox v. Prentice*, 3 M. & S. 344., it was laid down by the Court, on the authority of *Buller v. Harrison*, that an agent who receives money for his principal, is liable as a principal, so long as he stands in his original situation, and until there has been a change in circumstances, by his having paid over the money to his principal, or done what is equivalent to it. (*f*) In that case the defendant received a bar of silver from his principal, and sold it to the plaintiff, at a price calculated with reference to the number of ounces which on assay it was thought to contain; it turned out afterwards, that it contained fewer ounces than had been supposed, and the plaintiff was held entitled to recover the money overpaid from the defendant, who had not yet handed it to his principal, although he had forwarded an account to him, in which he was credited with the full sum, but which was still unsettled. In *Buller v. Harrison*, the defendant was an

(*d*) *Polhill v. Walter*, 3 B. & Ad. 114. See 1 Esp. 111. per Ld. Kenyon. *Beawes* 43. 3 T. R. 761. 3 P. Wms. 279. 1 Eq. Ab. 308. 2 Vern. 127.

(*e*) *Buller v. Harrison*, Cowp. 565.

Horsfall v. Handley, 8 Taunt. 136. *Greenway v. Hurd*, 4 T. R. 553. *Vernon*, 136. 208.

(*f*) See *Cary v. Webster*, 1 Str. 480.

insurance-broker, and the money sought to be recovered, was paid by the plaintiff, an underwriter, in discharge of a loss which turned out to be foul. It will be observed, that in neither of these cases could the principal himself, ever by possibility, have claimed to retain the money for a single instant had it reached his hands, the payment having been made by the plaintiff under pure mistake of facts, and being void, *ab initio*, as soon as that mistake was discovered, so that the agent would not have been estopped from denying his principal's title to the money, any more than the factor of J. S., of Jamaica, who has received money paid to him under the supposition of his employer being J. S. of Trinidad, would be estopped from retaining that money against his employer, in order to return it to the person who paid it to him. Except in such cases as these, the maxim *respondeat superior* has been applied, and the agent held responsible to no one but his principal. Thus, in *Stephens v. Badcock*, (g) the defendant, an attorney's clerk, having received by his master's orders rents for the plaintiff, a client; it was held that he was not responsible to the plaintiff, though his employer, the attorney, had since become a bankrupt: nor can an action for money had and received, be brought against an agent for the purpose of trying the existence of a right in his principal; thus, the right of the lord of the manor cannot be tried in an action against his steward for quit-rent, voluntarily paid: (h) and these decisions are but just, since, as the agent is estopped from questioning the title of his principal, he would, only for this rule of *respondeat superior*, be frequently exposed without any defence, to two different suits, in respect of the same subject matter. (i)

But an agent cannot defend himself, even on the ground of payment over to his principal, if he receive money *illegally*

(g) 3 B. & Ad. 354.

(h) *Saddler v. Evans*, 4 Burr. 1984.

Staplefield v. Yewd, cited *Ibid.* B. N.

P. 133. See *Alexander v. Southey*, 5 B.

& A. 247. *Wilson v. Anderton*, 1 B. & Ad. 450.

(i) See *White v. Bartlett*, 9 Bingh. 378. sed vide *Hardacre v. Stewart*, 5 Fsp. 103.

from a party who is not prevented from suing him by the rule *pari delicto potior est conditio defendentis*.^(k) This was decided in *Miller v. Aris*, Selw. N. P. 8th ed. 93., where the money was received by a gaoler from a prisoner for rent of a room illegally let to him, and paid over by the gaoler to his employers.^(l) Of course, if an agent pay money to his principal, which was not entrusted to him for that purpose, he will not be discharged,^(m) *ex gr.* if a stakeholder pay over the deposit before the condition on which it was to become due is performed.

Although there must be special circumstances to render an agent liable on *contracts* made for his employers, yet it is otherwise if he commit *torts* while acting in his master's service. In such a case the principal will, it is true, be often liable, but then the agent will invariably be so.⁽ⁿ⁾ However, an agent is not answerable to third parties for mere non-feazance, that is, for neglecting to do, as his master's agent, that which his master is bound, and has deputed him, to do. Thus, if the servant of a common carrier were to refuse to receive A.'s goods to be carried, on tender of the proper hire, he would not be liable to an action at the suit of A., although the carrier his master would, and although the servant would himself be liable to his master for a breach of duty as his agent.

(k) See *Smith v. Bromley*, Dougl. 696.

(l) Accord. *Townson v. Wilson*, 1 Camp. 396.

(m) *Sadler v. Evans*, ante. *Snowden v. Davis*, 1 Taunt. 359. *Edwards v. Hodding*, 5 Taunt. 815.

(n) 12 Mod. 488. 1 Leon. 146. Roll. Ab. 94. pl. 5. *Perkins v. Smith*, Sayer, 41. 1 Wil. 328. *Barker v. Braham*, 2 Bl. 867. *Goodwin v. Gibbons*, 4 Burr. 2108. *Bates v. Pilling*, 6 B. & C. 38. *Stephens v. Elwall*, 4 M. & S. 259. Mi-

chael v. Alestree, 2 Lev. 172. *Wilson v. Anderton*, 1 B. & Ad. 450., but see *Alexander v. Southey*, 5 B. & A. 247. *Mires v. Solesby*, 2 Mod. 242. In Roll. Abr. 95. it is laid down, that if the servant of a taverner sell wine that is corrupted, knowing it to be so, no action of deceit lies against the servant, for he did it but as a servant; whence it has been inferred, that a servant is not liable for fraud committed in his master's business; but surely this is difficult to be supported.

BOOK THE SECOND.

OF MERCANTILE PROPERTY.

WE now come to our second grand head, that, *videlicet*, of Mercantile Property. And here it must be premised, that it is not intended to consider the nature of the various possessions of which a merchant's property, as well as any other individual's, may be composed; for that would be to write a treatise upon property in general. The objects of this Book will be, 1st. To point out those peculiar incidents which property acquires, by passing into the custody of a merchant, and becoming part of his stock; and 2dly. To give some brief account of that description of property, which being seldom or never found in the hands of any one except a merchant, has more than ordinary claims to be included in a treatise devoted to Mercantile Law.

CHAPTER I.

INCIDENTS PECULIAR TO MERCANTILE PROPERTY.

First, then, it is to be observed, that all the property of a merchant, of what description soever, is transferable by, and subject to the operation of, the bankrupt laws; but as we have appropriated a chapter in the last part of this treatise to the consideration of bankruptcy, we will make no further observation upon it at present.

Secondly. It is known to be the ordinary rule of law, that where two or more persons are jointly possessed of property, the entire right to it on the decease of any of them remains to his survivors, and at length to the last survivor, who thus becomes entitled to the whole, which incident to joint tenancy is called by our ancient writers the *jus accrescendi*. (a) To this rule there is an exception in the case of partners in trade, of whom Lord Coke says, that “the wares, merchandizes, debts, or duties, which they have as joint merchants or partners shall not survive, but shall go to the executors of him that that deceaseth, and this is *per legem mercatoriam*, which is part of the laws of this realm, for the advancement and continuance of commerce and trade.” (b) Of the existence of this exception there is no doubt; but it has been questioned whether it can be enforced in courts of common law. It seems to be admitted upon all hands, that if real property be held in jointure for the purposes of trade, its exemption from the common rule relating to survivorship, can be enforced only through the medium of equity; the question above stated must therefore be confined to cases of joint-tenancy of chattels. In Lord Tenterden’s admirable treatise on the Law of Merchant Ships and Seamen, 5th edit. p. 68., his lordship, after remarking, that ships are usually purchased by several persons in distinct shares, so as to create a tenancy in common among them, goes on to observe, that “if the interests are not severed and distinguished in this way, but the entire ship is granted to a number of persons generally, it is apprehended that they become joint-tenants *at law*, and that the rule *jus accrescendi inter mercatores locum non habet*, which is applicable to a ship, is to be enforced only in equity.” No authority is cited for this position, which however, besides the weight which it derives from the high character of its distinguished author, seems to be countenanced by the expressions of the Master of

(a) Litt. 280. 281. 2 Black. Comm. 184.

(b) Co. Litt. 182. a. Comyn’s Dig. Merchant D.

the Rolls, in *Luke v. Gibson*, 1 Abr. Eq. 290., where it is laid down, that "in all cases of a joint undertaking or partnership, either in trade or any other dealing, they are to be considered as tenants in common, *or the survivors as trustees for those who are dead.*" Moreover, *Jeffreys v. Small*, 1 Vern. 217. 3 P. Wms. 158., which are usually cited as proving the exception turn out, upon examination, to refer solely to the rule in equity. On the other hand, in the passage above cited from the first Institute, the proposition is laid down generally by Lord Coke, who in all probability did not mean to refer to any rule in courts of equity, (c) and his opinion is supported by the authorities and precedents collected in the margin. (d)

This maxim, "*Jus accrescendi inter mercatores locum non habet,*" applies, as we have seen, to real property held in partnership for the purposes of trade. Its application can however only be enforced by courts of equity, and incident to its enforcement is the question which sometimes arises, whether the separate share of each partner is to be considered as real, or as chattel property, such property having been always personal in its enjoyment, though freehold in its nature, and having usually been acquired, not as a matter of choice but of necessity, by the sacrifice of part of the chattel property of the firm, which its owners would, had it been possible, have desired to continue in its original state of personalty.

In the earlier cases on this subject, it appears to have been thought, that freehold lands bought with the money, and used for the purposes of the firm, ought not to be considered in equity as converted into personal property; and therefore, that at the

(c) It is observable, that the doctrine of Lord Coke, in the above passage, extends to "*Debts and Duties,*" the remedy for which clearly survives. 1 Sal. 444. Com. Dig. Merch. D.

(d) Noy. 55. Brownl. & Gold. 99. *Kempe v. Andrews*, Holt. 145. S.C.

3 Lev. 290. S.C. Sal. 1. *Smythe et al. v. Milward*, Lutw. 1493. *Hall v. Huffam*, 2 Lev. 288. *Martin v. Crompe*, 1 Ld. Raym. 340. *R. v. Collector of Customs*, 2 M. & S. 223., this case is omitted in the last edition of Abbott on Shipping.

death of one of the partners, as equity allows no *jus accrescendi* among merchants, even in lands, the share of the deceased would descend to his heir, whose right thereto might be enforced in equity. (e) This doctrine, however, now seems more than questionable, and the modern rule is conceived to be, that all property of what nature soever, bought with the cash and for the purposes of a trading partnership concern, must in equity be looked upon as personal; and that, as there can be no survivorship in it, a partner's share will on his death pass to his personal representative, (f) for whose benefit the surviving partners, or their trustees will hold it; since in this case the *jus accrescendi* takes place at law. If indeed the partners have stipulated that freehold lands purchased by them shall not be subject to the application of this equitable doctrine, but shall follow the ordinary rules respecting property of that description, or if they act so that such a stipulation may be reasonably inferred from their conduct, in such a case the rule of equity yields to the ordinary course of law coupled with the intention of the parties, for *quilibet potest renunciare juri pro se introducto*. (g)

(e) Thornton v. Dixon, 3 Bro. 199.
Bell v. Phyn, 7 Ves. 453. 2 Hov. Suppl.
61.

(f) See Lord Eldon's observations
in Selkirk v. Davies, 2 Dow. 242. Rip-
ley v. Waterworth, 7 Ves. 425. Towns-
hend v. Devaynes, 1 Mont. on Partn.

Appendix, 96.

(g) Balmain v. Shore, 9 Ves. 500.
2 Hov. Suppl. 187. See Smith v. Smith,
5 Ves. 189. 1 Hov. Suppl. 502. Thorn-
ton v. Dixon, above cited, seems to fall
within this class of cases.

CHAPTER II.

SHIPPING.

SECTION 1. *Privileges of a British Ship.*

2. *What Ships are British.*
3. *Title to them, how acquired and transmitted.*
4. *Rights of Part Owners.*

THERE is one species of property, I mean that in shipping, to which (because it is almost exclusively mercantile, and subject to very peculiar regulations) it will be right to devote some attention : with this view we will consider,

1. What are the privileges of a British ship.
2. What ships are properly speaking British.
3. How title to them may be acquired and transmitted.
4. The rights of part owners.

SECTION I.—*The privileges of a British Ship.*

These are comprised in stat. 3 & 4 W. 4. c. 54., which prohibits the importation into the United Kingdom for use, of a number of European goods therein enumerated, except in *British* ships, ships of the country of which they are the produce, or from which they are imported, (a) and with some few exceptions, of all goods, the produce of Asia, Africa, or

(a) Sect. 2.

America, in foreign ships, unless they be ships of the country in Asia, Africa, or America, of which the goods are the produce, *and* from which they are imported. (*b*)

All trade between the United Kingdom and Guernsey, Jersey, Alderney, Sark, or Man, (*c*) all trade between those islands, or between different parts of any one of them (*d*) or of the United Kingdom, (*e*) all exportation from the United Kingdom to any British possession in Asia, Africa, or America, (*f*) all commerce between such possessions, or between different parts of the same possession, (*g*) except in British vessels, is prohibited; nor can any goods be imported into any such possession in foreign ships, unless they be ships of the country of which the goods are the produce, and from which they are imported. (*h*)

All manufactured goods are deemed the produce of the country of which they are the manufacture. (*i*)

SECTION II.—*What ships are properly speaking British.*

In order that a ship may be entitled to the name and privileges of a *British vessel*, she must be, 1st, *navigated*, and 2dly, *registered*, as one. (*k*)

A ship is navigated as a *British vessel*, when the master and three-fourths of the crew are *British*, and if employed in coasting between different parts of the United Kingdom, or between the United Kingdom and Jersey, Guernsey, Alder-

(*b*) Sect. 3 & 4.

(*c*) Sect. 6 & 7.

(*d*) Sect. 9.

(*e*) Sect. 8.

(*f*) Sect. 7.

(*g*) Sect. 10.

(*h*) Sect. 11.—N. B. No ship is admitted to be of a particular country, unless wholly owned by subjects of that

country usually residing therein, sect. 15; therefore, though a foreign-built ship may be legally owned by a British subject, *Long v. Duff*, 2 B. & P. 209. yet she will not fall within this or the preceding exception.

(*i*) Sect. 5.

(*k*) Sect. 12. stat. 3 & 4 W. 4. c. 54.

ney, Sark, or Man, or between any of them, or in fishing on the coast of the United Kingdom, or of any of those islands, the entire crew must be *British*. (l) In all cases, however, except those in which the whole crew is to be *British*, the ship is duly navigated if she have one *British* seaman for every twenty tons, though the other seamen may exceed in number one-fourth of the crew. (m)

The master or seamen are considered *British*, if natural-born subjects of his Majesty, or subjects by naturalization or denization, or having become so by conquest or cession and having taken the oath of allegiance or fidelity, or persons who have served on board a king's ship of war, in war time, for three years, but natives of places within the East India Company's charter, though under British dominion, are not therefore British. (n) The king may, by proclamation, in war time, declare two years' service on board a ship of war sufficient for this purpose, (o) and may at any time lessen the requisite proportion of *British* seamen. (p) Ships trading between places in America, may be navigated by British negroes, and ships trading eastward of the Cape of Good Hope, and within the limits of the East India Company's charter by Lascars and other natives of countries within those limits. (q)

If the due proportion of *British* seamen cannot be procured at any foreign port, or any place within the limits of the company's charter, or have been unavoidably destroyed, the master will be excused, on producing a certificate thereof from the British consul, or two known British merchants, if there be no consul, or the British governor of any place within the limits of the company's charter; or on making proof thereof to the satisfaction of the collector and comptroller of customs

(l) Ibid.

(m) Ibid. sect. 16.

(n) Ibid.

(o) Ibid. sect. 17.

(p) Ibid. sect. 20.

(q) Ibid. sect. 18.

of any British port, or of some other person authorised to make enquiry. (r)

For every excess of foreign seamen, the master forfeits 10*l.* per man ;(s) for goods illegally imported, exported, or carried coastwise, the goods themselves, and 100*l.* ;(t) nor is any registered ship to be allowed to depart from any port in the British dominions, unless duly navigated. (u)

Registry.

In order to entitle a vessel to the privileges of a British ship, it is (save in a few cases mentioned at the end of this section,) further necessary, that she should be registered as one, and a certificate of registry obtained ;(w) for otherwise she will, by exercising any of those privileges become forfeited, and may be seized by any officer of customs. (x) On this subject it will be proper to consider, what vessels are entitled to be registered, where, how, and by whom they must be registered ; when registry *de novo* is required, and lastly, when registry is dispensed with.

No ship is entitled to be registered, which is not, (y) 1st, wholly of the built of the United Kingdom, or of the Isle of Man, or Guernsey, or Jersey, or some of the colonies, plantations, islands, or territories in Asia, Africa, or America, or of Malta, Gibraltar, or Heligoland, which belong to his Majesty at the time of building ; or 2dly, condemned by a court of admiralty ; or 3dly, condemned by some competent court for a breach of the regulations relating to the slave trade.

Nor can any ship be registered, unless all the owners are British subjects : and even a British subject cannot be such

(r) Ibid. sect. 19.

(s) Ibid.

(t) Ibid. sect. 22.

(u) Ibid. sect. 18.

(w) 3 & 4 W. 4. c. 54. sect. 12.

3 & 4 W. 4. c. 55. sect. 2.

(x) 3 & 4 W. 4. c. 55. sect. 4.

(y) Ibid. sect. 5.

owner, if he *usually* (z) reside in any foreign country, unless he be a partner in, or agent for, some British factory, or house carrying on trade in Great Britain, or Ireland; neither can any person who has sworn allegiance to a foreign state, except under the terms of some capitulation, unless he afterwards become naturalized, or a denizen. (a)

Such a ship as the above, nevertheless, loses her privileges, and ceases to be considered *British*, or entitled to registry.

1st, If repaired in a foreign country, to the value of twenty shillings per ton, unless, by some extraordinary damage sustained abroad such repairs are rendered necessary to enable her to perform her voyage, and return to some port in the king's dominions, and those circumstances be proved before the persons, and in the manner, specified by stat. 3 & 4 W. 4. c. 55. s. 7., and a note thereof made on the ship's certificate of registry. (b)

2dly, If declared stranded or unseaworthy, and therefore ordered by the decree of a competent court to be sold for the benefit of the owners. (c)

3dly, If captured by, and become prize to an enemy. (d)

4thly, Or sold to foreigners. (e)

With respect to the mode of registry. In general, every ship must be registered at the port to which she belongs. (f) A ship is said to belong to some port, at or near which some or one of the owners, who shall make and subscribe the declaration required previous to registry, the nature of which will presently be specified, resides. (g) But no ship can be registered at Heligoland, unless wholly built there; nor

(z) For the construction put upon this word, see *case of the Eleanor*, 1 Edwards, 148.

(a) 3 & 4 W. 4. c. 55. sect. 12.

(b) Ibid. sect. 7.

(c) Ibid. sect. 8.

(d) Ibid. sect. 9.

(e) Ibid.

(f) Ibid. sect. 10.

(g) Ibid. sect. 11.

can any ship registered at Malta, Gibraltar, or Heligoland, be afterwards registered elsewhere, or be entitled to the privileges of British vessels in trading between the United Kingdom and our American colonies. (*h*) Ships taken and condemned as prize, are to be registered at Southampton, Weymouth, Exeter, Plymouth, Falmouth, Liverpool, or Whitehaven. (*i*)

The persons by whom registry is to be made, are, at ports in Great Britain, Ireland, or Isle of Man, the collectors and comptrollers of customs; in any port of the British possessions in Asia, Africa, or America, the collector and comptroller, or collector, if there be no comptroller; in Guernsey or Jersey, the principal officers of customs, together with the governor, lieutenant-governor, or commander-in-chief; in ports within the limits of the East India Company's charter, and under its government, the collector of duties, or any other person of the rank of senior merchant, or of six years' standing in the company's service, appointed to act by any of its governments in India; in any British possession within the same limits and not under the company's government, the collector of duties, together with the governor, lieutenant-governor, or commander-in-chief of such possessions; at Malta, Gibraltar, Heligoland, and the Cape of Good Hope, the governor, lieutenant-governor, or commander-in-chief; the powers and duties of these persons in the execution of the registry act are identical. (*k*)

The functions which (as will be seen,) are vested in the commissioners of customs, may be performed by the governor, lieutenant-governor, or commander-in-chief, of any place where ships are registered. (*l*)

In order to obtain registry, a declaration must be made and subscribed, by the owner, if only one; if two, both resident within twenty miles of the place of registry, by both of them;

(*h*) Sect. 3.

(*i*) Sect. 30.

(*k*) Sect. 3.

(*l*) Sect. 3.

if either at a greater distance, by one only ; if more than two, by the greater part, (not exceeding three,) if resident within twenty miles, unless a larger number wish to join ; if all, or all but one, reside at a greater distance, then by one only. If the required numbers do not attend, declaration must be made by such as do, that the absent do not reside within twenty miles, and have not wilfully absented themselves, or are prevented by illness from attending. (*m*)

The declaration contains the ship's name, (which must not afterwards be changed, and must be painted on her stern, together with the port to which she belongs, in white or yellow letters four inches long, on a black ground, and not afterwards obliterated or concealed, unless in square-rigged vessels during war ; nor must she be described by any other name in print or writing, or even verbally, to a revenue officer on duty, disobedience to these regulations subjecting to a penalty of 100*l.*,) (*n*) her port, master, and description ; the names, description, and residences of the owners, with other circumstances, tending to prove them subjects of his Majesty, and denies that any foreigner is interested in the ship. (*o*)

If the ship belong to a corporation, the declaration is made by the secretary or other proper officer, and the corporate name substituted for those of the owners. (*p*)

The attending owner, and the master must also jointly, or in case of the master's absence with the ship, severally (by which, however, they are jointly and separately bound,) execute a bond as a security, that the certificate shall be used for the ship's service only, and for its return, in case the ship be lost, captured, destroyed, prevented from returning to her port, forfeit her privileges, be condemned for illicit trading, sold in execution, sold to the crown, or to a foreigner either in part or whole, or registered *de novo*. (*q*)

(*m*) Sect. 13, 14.

(*n*) Sect. 24.

(*o*) Sec. 13. ubi vide form of declaration.

(*p*) Sect. 13.

(*q*) Sect. 20.

The applicant for registry, must also produce an account under the builder's hand, and which the builder is required to give, of the ship's time and place of building, denomination, tonnage, (which is ascertained in a mode pointed out by sects. 16 to 20 inclusive,) together with the name of the first purchaser; he must also make declaration of her identity. (r)

In the case of a prize or condemned ship, he must produce a certificate of her condemnation under the judge's hand and seal, and an account of the particulars set forth in a certificate of registry, subscribed by one or more skilful persons appointed by the court to survey her, and must make declaration of her identity. (s)

The above requisites being complied with, the ship is registered, and a *certificate of registry* delivered to the applicant; this certificate contains (t) the name, occupation, and residence, of every owner; the name of the ship; the place to which she belongs; her tonnage; the name of the master; the time and place of the built or of condemnation; the name of the surveying officer; the number of decks and masts; the height, breadth, and depth between decks if more than one, or depth of the hold if only one deck; whether rigged with a standing or running bowsprit; the description of her stern, whether carvel or clinker built; and gallery; and kind of head, if any; and on the back are indorsed the names of the owners, who cannot be more than thirty-two, with the number of sixty-four shares held by each; the property of every vessel being, as we shall hereafter see, divided into sixty-four equal shares.

All the above particulars are entered in a book, which the registering officers are required to keep; every registry is numbered in progression, beginning from the commencement

(r) Sect. 25.

(s) Sect. 29.

(t) Sect. 2.

(u) Sect. 32.

of each year, and an exact copy thereof transmitted, within a month, to the commissioners of customs. (x)

If at any period the master be changed, the certificate must be delivered to the persons authorised to register at the port where the change takes place, who are to indorse the change on the certificate, and transmit notice of it to the proper officer at the ship's port, who transmits it to the commissioners of customs; the new master is to give a bond, such as was given by the old one at the time of registry. (y)

Registry de novo. 1st. Whenever the owner or owners who subscribed the declaration, shall have transferred all his or their shares in the ship, she must be registered *de novo*, before departure from the port to which she belongs, or from any port in the same part of the United Kingdom, or the same colony, plantation, island, or territory. But the collector and comptroller may certify on the back of the certificate, that it is to remain in force during another voyage, if there be not time for registry *de novo*, before her departure thereon. (z)

2dly. If the certificate be lost or mislaid, the commissioners of customs are to permit a registry and certificate *de novo*, the master and owners giving a bond, conditioned that the old certificate, if found, shall be delivered up, and has not nor shall be illegally used with their knowledge. Or the commissioners may grant a licence, which will, *pro tempore*, serve as a certificate; the master in such case declaring that the ship was registered, naming the port, time, and particulars of the certificate, to the best of his belief, and giving a bond, such as is last mentioned; the ship too must be surveyed, as if for registry *de novo*, and the certificate of survey preserved by the collector and comptroller at the ship's port, in virtue whereof, the commissioners will permit the ship to be registered after her departure, whenever the owners attend to

(x) Sect. 10.

(z) Sect. 11.

(y) Sect. 21.

make the declaration and comply with the other requisites of the act except so far as relates to the bond to be given by the master, and will transmit the new certificate to the collector and comptroller of any port, to be handed to the master on his executing the bond, and giving up the licence. (a)

3dly. If any person be convicted of illegally detaining the certificate, (which is punishable summarily by sect. 27.) the persons who made the first registry will on certificate of the conviction, make registry *de novo*, and if the detaining party have absconded, the commissioners will, on proof thereof, permit registry *de novo*, as in case of a certificate lost or mislaid. (b)

4thly. If the ship have been altered, so as not to correspond with the particulars in her certificate, she must be registered *de novo* on her return to her port, or to any other port in the same part of the United Kingdom, or the same colony, plantation, island, or territory. (c)

5thly. On any change of property in a ship, the owners may, if they think fit, have her registered *de novo*. (d)

It remains to enumerate the cases in which registry is dispensed with, viz.

1st. That of British-built boats and vessels, not exceeding fifteen tons burthen, wholly owned and navigated by British subjects, and employed in the rivers, and on the coasts of the United Kingdom, or of the British possessions abroad, not proceeding over sea, except within the limits of their respective colonial governments, within which their managing owners reside. (e)

2dly. British-built boats or vessels, wholly owned and navigated by British subjects, not exceeding thirty tons, and not having a whole or fixed deck, employed solely in fishing

(a) Sect. 26.

(b) Sect. 27.

(c) Sect. 28.

(d) Sect. 39.

(e) 3 & 4 W. 4. c. 54. sect. 13.

on the banks and shores of Newfoundland, and the parts adjacent, Canada, Nova Scotia, New Brunswick, adjacent to the Gulf of St. Lawrence, or the north of Cape Canso, or of the islands within the same, or in trading coastwise within the same limits. (*f*)

3dly. Ships built in the British settlements at Honduras, and owned and navigated as British ships, which are entitled to the privileges of British ships, in all direct trade between the United Kingdom, or the British possessions in America, and the said settlements, on production of a certificate from the superintendant of the settlement, that the ship is so built and owned, and with the time of her clearance for the voyage indorsed by him upon it. (*g*)

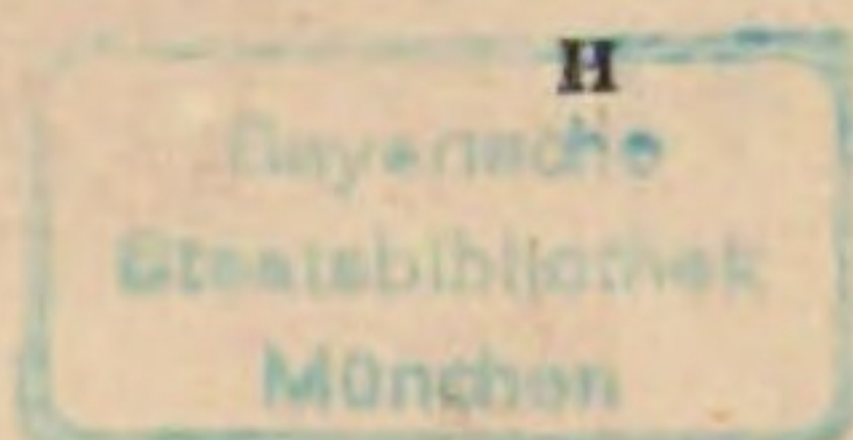
4thly. There is one case in which the registry of a ship is *temporarily* dispensed with, *viz.* if a ship be built in any of the colonies, plantations, islands, or territories, in Asia, Africa, or America, for owners in the United Kingdom, and the master or agent for the owner produce to the collector and comptroller of the port at or near which she was built, the builder's certificate required by the registry act, and make declaration of her identity, the principal owners names' and descriptions, and that no foreigner, to his belief, is interested therein; the collector and comptroller shall cause her to be surveyed and measured, and give the master a certificate, which has for two years, if the ship arrive not sooner in the United Kingdom, the force of a certificate of registry. (*h*)

Lastly. It is to be observed, that no ship is absolutely required to be registered; registry being only necessary to confer the privileges of a British ship.

(*f*) Ibid.

(*h*) 3 & 4 W. 4. c. 55. sect. 11.

(*g*) 3 & 4 W. 4. c. 54. sect. 14.



SECTION III.—*How title to British Ships may be acquired and transmitted.*

We have now shewn what are the privileges of a British ship, and what ships have a right to be called British. We proceed to consider how title to such ships may be acquired, and how transmitted.

A ship is a personal chattel, and therefore generally speaking, subject to the rules which govern that description of property. It may be originally acquired,—

1. By building it.
2. By capture from an enemy in time of war, sanctioned by condemnation by a competent court of the capturing power, constituted according to the law of nations.

Although such capture and condemnation suppose a pre-existing right in some one to the vessel captured; yet this is enumerated as a mode whereby property in it may be *originally acquired*, because we are, as must be recollected, treating only of *British ships*; and its right to be registered, and consequently to be called British, doth not accrue till sentence of condemnation. (*k*) Respecting the court in which this sentence is passed, there is the following rule, *viz.* That a legal sentence of condemnation cannot, according to the law of nations (which regulates all cases of prize,) be passed by the consul or minister of the belligerent power in the country of a neutral power to which the prize has been taken. (*l*) But states in alliance with the captors, and at war with the country to which the prize belongs, are considered as forming one community with the captors, and a prize carried into such a state may be condemned, either there by a consul belonging

(*k*) 2 & 3 W. 4. c. 55. sect. 5.

Rep. 96. *Havelock v. Rockwood*, 8 T.

(*l*) *The Flad Oyen*, 1 Rob. Ad.

R. 268.

Rep. 135. *The Kierleggett*, 3 Rob. Ad.

to the nation of the captors, (*m*) or in the country of the captors. (*n*)

2dly. Title to a ship may be transmitted by the operation of the bankrupt or insolvent law, and pass as part of the bankrupt's or insolvent's property to his assignees, or as goods in the ordering and disposition of the former, (*o*) or it may be taken and sold in execution, being as we have seen, a chattel personal, in which case it must be registered *de novo*.

But the ordinary mode of acquiring property in shipping is, by conveyance from a person authorised to dispose of it. Such a person may be—

1st. *The Master.*

It is said, that in a case of extreme necessity, the master may sell the ship for the benefit of the owners, though nothing but extreme necessity will justify such a step. (*p*) “Suppose for instance,” said the learned judge, in the case of the *Fanny and Elmira*, Edw. Ad. Rep. 117., “a ship in a foreign country, where there is no correspondent of the owners, and no money to be had on hypothecation to put her into repair, under these circumstances what is to be done? The ship may rot before the master can hear from his owners; and therefore, if the necessity were clearly shewn, with full proof that every thing was done *optimâ fide*, for the real benefit of the owners, the Court might be disposed to sustain a purchase so made. But there must be the clearest proof of necessity: it must be shewn not only that the vessel was in want of repair, but likewise that it was impossible to procure the money for that purpose.”

2dly. *The Owner.*

The conveyance of property in British ships is almost en-

(*m*) *The Betsey*, 2 Rob. A. R. 210.

(*o*) 6 G. 4. c. 16. s. 72.

n. Oddy v. Bovil, 2 East. 473.

(*p*) See on this subject Abbott on

(*n*) *The Christopher*, 2 Rob. A. R. Shipping, Part 1. c. 1.

tirely regulated by the provisions of the Registry Act, stat. 3 & 4 W. 4. c. 55. We have already seen how a ship is registered in the first instance; the nature of the *book of registry* which the public officers are required to keep, and of the *certificate of registry*, which they deliver to the owners. It is further necessary to observe, and has indeed been incidentally stated, that the property of every British vessel is considered by law as divided into sixty-four equal parts, and that no person can be registered as an owner, in respect of any proportion not being a 64th part. (*q*)

It is however provided, that if the property of an owner or owners cannot be divided into sixty-four parts, the owner or owners of such fractional parts as are above the number into which it can be divided, may transfer the same to one another, or to a new owner, without payment of stamp duty, and their right shall not be affected by the non-registry of their shares. And that partners may hold ships or shares in the name of their house, without distinguishing the interest of each owner, which ship or shares are to be subject to the rules that govern other partnership property.

It is further to be observed, that not more than thirty-two persons can be *legal* owners of a ship at the same time, or registered as such; a provision which does not however affect the equitable title (*r*) of minors, heirs, legatees, creditors, and others, duly represented by, and holding from any registered owners within that number; and the commissioners of customs have the power of allowing joint stock companies, of any number, to hold ships through the intervention of not less than three trustees. (*s*)

Keeping these rules in mind, we will proceed to consider the mode which the legislature hath pointed out for the transfer of a ship from one person to another.

This is effected by a bill of sale, or other instrument, in

(*q*) Sect. 32.

(*s*) Sect. 33.

(*r*) See 6 Ves. 739. 15 Ves. 68.

writing, which must recite the certificate, or principal contents thereof, otherwise the transfer is invalid. But no bill is to be void on account of any error in the recital, or the recital of a former instead of the existing certificate, provided the identity of the ship be sufficiently proved thereby. (t)

But no bill of sale is valid or effectual, for any purpose, until produced to the collector and comptroller of the port where the ship is registered, or about to be registered *de novo*, who are to enter in her last book of registry, in the one case, or in the book of registry *de novo*, after all requisites for such registry *de novo* have been complied with, in the other case, the name, residence, and description of the vendor and vendee, mortgagor and mortgagee, or each, if more than one; the number of shares transferred, and the date of the instrument, and of the production of it; and are (except in case of registry *de novo*, when a new certificate is granted,) to indorse on the ship's certificate of registry when produced to them, the aforesaid particulars in a prescribed form, and give notice thereof to the commissioners of customs, and if required, to certify by indorsement on the bill of sale, or other instrument, that such entry on the book, and indorsement on the certificate of registry have taken place. (u)

When the entry in the book of registry has been made, the bill of sale, or other instrument, becomes effectual to pass the property intended to be transferred, as against all persons whatever, except against such subsequent purchasers and mortgagees who shall first procure the indorsement to be made on the certificate of registry, in manner hereinafter mentioned. (v)

For where the same property has been transferred more than once, the several vendees and mortgagees take priority, not according to the time of entering their respective instruments

(t) Sect. 31.

(v) Sect. 35.

(u) Sect. 34.

in the book of registry, but according to the time when the indorsement is made in the certificate. (w)

Thus, if the owner of a share fraudulently execute two different bills of sale thereof to two different persons, and both cause their conveyances to be entered in the book of registry, but the second get into possession of the certificate, and procure the indorsement to be made on it, he, and not the first vendee, will have the legal title to the share.

But it is further provided, that when any instrument of transfer has been entered in the book of registry, there must be a lapse of thirty days, or (if the ship were absent from her port, at the time of such entry,) thirty days from her arrival thereat, before any instrument, purporting to be a transfer of the same ship or share from the same vendor or mortgagor to any other person, can be entered: so, if a second instrument have been entered, a like period must elapse between its entry and that of a third; and wherever more than one have been entered, the officer is to indorse on the certificate the particulars of that one under which the person claims, who shall produce the certificate for that purpose within thirty days after the entry of his instrument in the book, or of the ship's return to port if she were absent at the time of such entry: and if no person produce the certificate within such time, then the officer is to indorse the particulars of that person's instrument who shall first produce the certificate for that purpose. It is however provided, that if the certificate be lost, mislaid, or detained, on proof of this by a vendee or mortgagee, time may be granted either for its recovery or for registry *de novo*, during which additional time no other transfer can be entered in the book of registry. (x)

Thus it appears, that in case of successive sales of the same property by the same person, each of the rival vendees has thirty days from the entry of his instrument, or next subsequent return of the ship to port, during which no one but

(w) Sect. 36.

(x) Sect. 36.

himself can obtain a perfect title. But if he let that space of time go by, he will be in danger of having his claim defeated by an indorsement of the particulars of some other vendee's instrument on the certificate, unless indeed further time have been granted to him, in the manner above pointed out.

To put an example. Suppose the owner of a share in a ship at sea fraudulently executes one bill of sale to A., and another to B.; A. causes his bill of sale to be entered in the book of registry at the ship's port: his title is now perfect against the vendor, and against every one else except B.; and B. himself cannot procure his bill of sale to be even entered in the book of registry, the time not having elapsed, which is given as we have shewn, to A. exclusively. The ship returns to port, say on the 1st of October, A. allows that month to elapse without taking any step: on the 31st of October A.'s thirty days expire; and on the 1st of November B. procures his instrument to be entered in the book of registry, but neglects to adopt any further measure to secure his purchase. A. now obtains the certificate of registry from the master of the ship, but cannot perfect his title, by having the particulars of his bill of sale indorsed on it, until the 2d of December shall have arrived, the law appropriating the intermediate days to the exclusive use of B. On the 2d of December, however, A. produces the certificate to the collector and comptroller at the ship's port, has the indorsement made, and his title then becomes perfect against all the world.

It is further provided by the registry act, that if, after any bill of sale has been recorded at the port to which the ship belongs, it be produced with a notification upon it of such record and along with the certificate of registry, to the officers of any other port; those officers, if required, are to indorse on the certificate the transfer mentioned in the bill of sale, and give notice of their having done so to the officers of the port to which the ship belongs, who will record it there, as if they had made the indorsement themselves, but mentioning

the facts. However, before the officers at the other port can make such indorsement, they are to give notice of the requisition made to them, to the officers of the port to which the ship belongs, and ascertain from them whether any and what bills of sale have been entered in the book of registry, after which they are to proceed to indorsing the certificate, *as if their port were that to which the ship belongs.* (y)

Thus, the person who would be entitled to have the indorsement made on the certificate, immediately on the return of an absent vessel to her port, may have it made by anticipation, during her absence.

If a ship or share be sold in the owner's absence, by his known agent and correspondent acting for him, and who has executed a bill of sale to the purchaser, without any legal power to do so, the commissioners of customs may, on proof of the fair dealing of the parties, permit the transfer to be registered, recorded, or indorsed, as the case may be, as if a legal power had been produced. So, if a bill of sale cannot be produced, or by reason of distance of time, or absence, or death of parties, cannot be proved to have been executed, the commissioners may, on proof of the fair dealing of the parties, permit the ship to be registered *de novo*, as if a bill of sale had been produced. But in any of these cases good security must be given to produce a legal power or bill of sale in reasonable time, or abide the future claims of the absent owner or his representatives, which security will be available for the protection and indemnity of the party whose property has thus been transferred, in addition to his other rights, whether in law or equity. (z)

In case of mortgage.

The above considerations are applicable to every instance in which property in shipping is transferred, but there are one or two regulations peculiar to cases of mortgage.

(y) Sect. 37.

(z) Sect. 41.

When a transfer is made by way of mortgage, or to a trustee, for the purpose of sale for the payment of debts, the nature of the transfer is to be expressed in the entry in the book, and indorsement on the certificate of registry, and the transferee is not deemed to have become, or the transferror to have ceased to be, the owner of the property transferred, except so far as may be necessary to make it available by sale or otherwise, for the payment of the debt it was transferred to secure. (a) It has been doubted, since this enactment, whether a mortgagee can insure the entire value of the ship. (b) However, if he take possession of it, as he may, during a voyage, he is entitled to receive the freight earned in that voyage. (c) As the entire property does not pass to the mortgagee, there of course remains a portion in the mortgagor, which he can transfer to a second purchaser or mortgagee in the manner prescribed by the registry act; and it seems from the remarks of the Bench in a recent case, (d) that an instrument purporting to transfer such residue of interest, and taking notice of the right of a prior mortgagee, will not entitle the party claiming under it to a priority to such mortgagee, although his transfer may never have been indorsed on the certificate, and all proper formalities may have been complied with in the case of the second instrument.

The mortgagee is preferred to the assignees of the mortgagor in case of bankruptcy, and protected from having the mortgaged property considered as in the bankrupt's ordering and disposition. (e)

(a) Sect. 42.

(d) Exp. Jones in re Richardson,

(b) Irving v. Richardson, 2 B. & Ad. 2 Tyrwh. 686.

196.

(e) Sect. 43.

(c) Kerswill v. Bishop, 2 Tyrwh. 602.

SECTION IV.—*Rights of Part Owners.*

It remains to consider the rights of part owners of a ship amongst themselves.

It is possible that joint-tenancy may be created in a ship, as well as in any other chattel, by a grant to several persons jointly, and if it be, the rule *jus accrescendi inter mercatores locum non habet*, will apply to it. But the operation of the Registry Act occasions this sort of property to be usually conveyed in distinct shares of one or more sixty-fourth parts, the owners of which are tenants in common of the vessel, and would hold it subject to the general rule of the common law, which permits any one tenant in common to seize upon the chattel, and regulate the mode of its enjoyment to the exclusion of the rest, (f) were it not that public policy steps in, and exempts this sort of property from a rule, which if applied to it, might prove injurious to commerce. Accordingly, if the owners themselves have not precluded all dispute, by agreeing in the choice of a *ship's-husband*, or managing owner, and delegating the care of their interests to him, the Court of Admiralty interferes by arresting the ship, and preventing the majority of owners from sending her abroad against the will of the minority, without first entering into a stipulation, in a sum equal in value to the shares of the dissentients, either to bring back the ship, or pay the value of their shares. On giving this security they are permitted to send the ship to sea; (g) and if the minority are in possession of it, may take it out of their hands for that purpose by a warrant of the Court. But the dissentient owners bear no part of the expense, and are entitled to no part of the profit of the voyage

(f) *Graves v. Sawcer*, T. Raym. 15.

1 Lev. 29. *Strelley v. Winson*, 1 Vern.

297. *Skinner* 230.

(g) See *Abbott on Shipping*, Part. 1.

c. 3.

to which they have disagreed. (*h*) In case the owners be equally divided in opinion, either half may apply to the Court to interfere, in the manner above stated. (*i*)

As the Court of Admiralty may arrest the ship, for the protection of one part of the owners against another, so it may for the protection of the owner or owners against a wrong doer. (*k*)

The ordinary mode for part owners to obtain an adjustment of the ship's accounts, is by suit in a court of equity; they may, however, by naming a ship's husband, and inserting special provisions in his appointment, entitle themselves to an action against him, in case he fail in making up his account, and dividing the profits; (*l*) while on the other hand, the ship's husband, if he have advanced money for outfits, may sue each of the owners for his proportion. Part owners resemble partners, with respect to the concerns of the ship, and are therefore, generally speaking, all liable to the full extent of debts contracted, for its repair and other necessary expenses. (*m*)

In what concerns these, where the ship is under the management of the master, and the owners divide the profits, the master is *primâ facie* (*n*) agent for them all. But although their connection in this respect resemble that of partners, yet it is clearly not a partnership. (*o*) The admission of one is

(*h*) *Davis v. Johnston*, 4 Simon 539.
The Apollo, 1 Hagg. Ad. R. 306. Abbott on Shipping, Part 1. c. 3.

(*i*) *Ib.*

(*k*) *Per Curiam*, in *re Blanshard and others*, 2 B. & C. 244.

(*l*) *Owston v. Ogle*, 13 East. 538.
Servante v. James, 10 B. & C. 413. See *Radenhurst v. Bates*, 3 Bingham 463. *Davies v. Hawkins*, 3 M. & S. 488., as to the rights of the ship's husband against the shipowners, see *Helme v. Smith*,

7 Bingham 709.

(*m*) *Teed v. Baring*, Abbott on Shipping, p. 84. See *Briggs v. Wilkinson*, 7 B. & C. 30. *Exp. Bland*, 2 Rose 91. *Thompson v. Finden*, 4 C. & P. 158. *Cox v. Reid*, R. & M. 199.

(*n*) For the mere legal ownership will not, *per se*, render a part owner liable. *Briggs v. Wilkinson*, 7 B. & C. 34. *Jennings v. Griffiths*, R. & M. 43. *Young v. Brander*, 8 East. 10.

(*o*) See *Wilson v. Dickson*, 2 B. &

not binding upon the other; (*p*) each may transfer his share without the consent of the others, nor is it liable to confiscation for acts done by the others without his privity; thus, if one part owner be the proprietor of the cargo, condemnation thereof involves the condemnation of his share of the ship, but not that of the shares of other part owners, who knew nothing of the contraband commodities. (*q*)

A. 2. Helme v. Smith, 7 Bingh. 715.

(*p*) Jagers v. Binnings, 1 Stark. 64.

Briggs v. Wilkinson, 7 B. & C. 34.

(*q*) The Jonge Tobias, 1 Rob. 329.

Williams v. Thomas, 6 Esp. 18.

CHAPTER III.

GOODWILL.

THERE is another sort of property, if property it can be called, of a nature so exclusively mercantile, as to deserve a separate mention. I mean *the goodwill of a business*, which though arising from various, and often accidental circumstances, such as the situation of a house, the changes in a neighbourhood, and even the prejudices of customers, has been often recognized in courts of equity as an existing and valuable interest: (r) and therefore, when property to which it attaches, is sold under their decrees, they will direct that steps be taken to impress the purchaser with a just notion of its value. (s) It has also been taken notice of by a court of law. (t) But where the profits of the business result almost entirely, from confidence placed in the personal skill of the party employed, as in the case of surgeons (u) or attornies, the goodwill is too insignificant to be taken notice of. The sale of a *goodwill* does not preclude the seller from setting up the same kind of business again in the same neighbourhood, if he do not describe himself as setting up the identical business that has been purchased. (w) By the conveyance of a shop the goodwill passes, although not specifically mentioned. (x)

(r) Kennedy v. Lee, 3 Mer. 441.

(s) Cook v. Collingridge, Jac. 607.
and note to Collyer on Part. p. 172.

(t) Exp. Farlow, 2 B. & Adol. 341.
R. v. Hungerford M. Co., Exp. Still,
4 B. & Ad. 592. Ibid. Exp. Gosling,
ib. 596.

(u) Farr v. Pearce, 3 Madd. 78.

Spicer v. James, Rolls M. T. 1830. re-
ported Collyer on Part. 82.

(w) Farr v. Pearce, 3 Madd. 74.
Crutwell v. Lye, 1 Rose 123.

(x) Chissum v. Dewes, 5 Russ. 29.

CHAPTER IV.

PROPERTY IN NEGOTIABLE INSTRUMENTS.

UNDER the head of Mercantile Property, it seems right to advert to a peculiarity in the mode in which title may be acquired to a description of chattels, most usually found in the hands of mercantile men, *viz. negotiable instruments*. The common and well known rule of law is, that property in a chattel personal cannot, except by sale in market overt, be transferred to a vendee, however innocent, by a party who does not himself possess it. The contrary, however, is the case with respect to negotiable instruments, a transfer of which, when in that state in which by law and the usage of trade they accustomably pass from one man to another by delivery, causes the property in them like that in coin, to pass along with the possession, (a) provided that the transferee has been guilty of no fraud or gross negligence in taking them, in which cases he would be forced to bear the loss. (b)

An instrument is, properly speaking, negotiable, when the *legal* right to the property secured by it is transferable from one man to another by its delivery: of this description are bills and notes payable to bearer, or indorsed in blank; (c)

(a) See *Grant v. Vaughan*, 3 Burr. 1516. *Lang v. Smyth*, 7 Bingh. 284. *Gorgier v. Mieville*, 3 B. & C. 45.

(b) *Solomons v. Bank of England*, 13 East. 135. n. *Gill v. Cubitt*, 3 B. & C. 466. *Snow v. Peacock*, 3 Bingh. 408. *Down v. Halling*, 4 B. & C. 330. *Slater v. West, Dans. & Lloyd* 15. *Beckwith v. Corral*, 3 Bingh. 444. *Strange v. Wigney*, 6 Bingh. 677. *Easley v. Crock-*

ford, 10 Bingh. 243. *Crook v. Jadis*, 6 C. & P. 194.

(c) *Miller v. Race*, 1 Burr. 452. *Clarke v. Shee*, Cowp. 200. *Solomons v. B. of England*, 13 East. 135. *Grant v. Vaughan*, 3 Burr. 1516. *Collins v. Martin*, 3 B. & P. 649. *Peacock v. Rhodes*, Dougl. 636. *Wookey v. Pole*, 4 B. & A. 1.

and such was held a bond, whereby the King of Prussia bound himself and his successors "to every person who should for the time being, be the holder of the bond," and which was proved to be usually negotiated in the English market by delivery. (*d*)

I call those instruments negotiable, by delivery of which, the *legal* right to the property which they secure, may be conveyed. For there are other instruments (*e*) which, though saleable in the market by the usage of merchants, can yet only be put in suit in the name of the original contractee, and are not, properly speaking, *negotiable*. Moreover, instruments which in one state would be *negotiable*, may by being put into another, cease to be so. Thus, though a bill or note will be *negotiable* if indorsed in blank, yet the holder may, by a special indorsement, determine its negotiability. (*f*)

(*d*) *Gorgier v. Mievill*, 3 B. & C. 45.

187., and *Turner v. Cruikshank*, there cited.

(*e*) See *Glynn v. Baker*, 13 East 509. *Taylor v. Kymer*, 3 B. & Ad. 338. *Taylor v. Trueman*, 1 M. & M. 453. 1 Lloyd & Welsb. 184. See *Ford v. Hopkins*, 1 Sal. 284., and see 1 Burr. 452. *Ambl.*

(*f*) *Sigourney v. Lloyd*, 8 B. & C. 622. 5 Bingham 525. *Archer v. Bank of England*, Douglas 639. *Snee v. Prescott*, 1 Atk. 249. per Lord Hardwicke. *Treuttel v. Barandon*, 8 Taunt. 100.

BOOK THE THIRD.

OF MERCANTILE CONTRACTS.

WE now proceed to the examination of those contracts, which are most commonly in use among mercantile men. In these, though for the sake of clearness, they are here treated of under a distinct head, a very large portion of the *Mercantile Property* of the kingdom consists. Thus, a considerable part of a man's wealth is often made up of bills of exchange, bank notes, and credits with his banker or correspondent, all which species of property lie in contract, or as the Courts term it, in action; their owner being possessed, not of the sums of money specified in the bill or note, or deposited in the hands of the banker, but of a right to receive those sums from the person holding, or supposed to hold them; and to enforce their payment, if denied, through the medium of some competent tribunal.

CHAPTER I.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

SECT. 1. *Their definition, requisites, and form.*2. *Parties to.*3. *Transfer of.*4. *Acceptance.*5. *Presentment.*6. *Notice.*7. *Payment.*8. *Resistance against payment.*9. *Remedy on lost bills and notes.*SECTION I.—*Their Definition, Requisites, and Form.*

A *Bill of Exchange*, is a written order for the payment of a certain sum of money unconditionally. He who makes this order, is called the *drawer*: he to whom it is addressed, the *drawee*; and if he accept it, the *acceptor*: he in whose favour it is made, the *payee*.

A *Promissory Note*, is a written promise to pay a certain sum of money unconditionally. He who promises, is called the *maker*; he to whom the promise is made, the *payee*. (a)

Bills of exchange derive their peculiar properties from the custom of merchants; promissory notes, from stat. 3 & 4 Ann. cap. 9., which places them on the same footing with bills of exchange.

Although a promissory note, while in its original shape, bears no resemblance to a bill; yet when indorsed, it is exactly similar to one; for then it is an order by the indorser of the note upon the maker, to pay to the indorsee. The indorser is

(a) A check is a bill of exchange, addressed to a banker, and payable to a certain person or bearer. A bank note is a promissory note made by a banker.

as it were the drawer; the maker, the acceptor; and the indorsee, the payee. (b) The reader, bearing this similitude in mind, will easily be able to apply to notes the decisions hereinafter cited concerning bills, and *vice versa*.

A bill of exchange operates as an undertaking from the drawer to the payee and every subsequent holder, that the drawee is a person competent to accept, that is, engage to pay it; and that he will, when requested, accept, and when it becomes due, pay it.

A note operates as an undertaking by the maker to the payee and every subsequent holder, that he will pay the money therein named, in the mode therein specified.

No particular form of words is requisite to constitute a note or bill; (c) and if it appear doubtful for which of the two a particular instrument was intended, it may be treated as either. (d) But it must fall strictly within one of the above definitions. Thus there must be an *order* or *promise* to pay; the mere *acknowledgement* of a debt, such as an I.O.U., is not a promissory note, (e) nor does a supplication to the drawee that he will pay amount to a bill of exchange; for that purpose there must be an *order*. (f) Again, it must be for the payment of *money* alone; (g) an order or promise to pay "in cash, or Bank of England notes," is insufficient; (h) and

(b) See *Heylin v. Adamson*, Burr. 669. *Brown v. Harraden*, 4 T. R. 148. *Carlos v. Fancourt*, 5 T. R. 482. *Edie v. E. I. Compy.*, Burr. 1224.

(c) *Chadwick v. Allen*, Str. 706. *Morris v. Lea*, L. Ray. 1396. Str. 629. *Shuttleworth v. Stephens*, 1 Camp. 407. *Greig v. Milner*, 8 Taunt. 739. *Starke v. Cheesman*, Carth. 509. *Dehers v. Harriott*, Show. 163. *Robinson v. Bland*, 2 Burr. 1077. *Ridout v. Bristow*, 1 Tyrwh. 84. *Green v. Davies*, 4 B. & C. 235. *Block v. Bell*, 1 M. & Rob. 149.

(d) *Edis v. Bury*, 6 B. & C. 433.

(e) *Fisher v. Leslie*, 1 Esp. 426. *Childers v. Boulnois*, 1 Dowl. N. P. C. 8. *Ellis v. Ellis*, Gow. 216. *Israel v. Israel*, 1 Camp. 499., but see *Guy v. Harris*, Chitty on Bills, 5th ed. 428. contra.

(f) *Little v. Slackford*, 1 M. & M. 171.

(g) *Martin v. Chauntry*, Str. 1271. *Anon.* B. N. P. 272. *Exp. Imeson*, 2 Rose, 225. *Exp. Davison*, Buck. 31. *R. v. Wilcox*, Bayley, 5th ed. p. 11. *Bolton v. King*, 4 B. & Adol. 619.

(h) *Sed quære*, since 3 & 4 W. 4. cap. 98. sec. 6.

June 12, 1750, (p) or six weeks after the death of A. B. (q) have been held payable at all events, and therefore good; for, to use the words of Willes, C.J., "If a bill or note be made payable at ever so distant a day, yet if it be a day that must come, it is no objection to the bill or note;" and therefore a note payable *within two months after his Majesty's ship A. B. shall be paid off*, is good, for the paymaster being Government, it is morally certain that payment will be made. (r)

Although conformity with one of the above definitions is in general strictly required; yet, if a word be fraudulently inserted by the maker or drawer, in order to prevent the instrument from acquiring the legal properties of a bill or note, as where the maker of a note worded it thus—"I promise *not* to pay," the Court will reject the word so fraudulently introduced, and read the instrument without it. (s)

A bill or note is called *inland* when made and payable in England; *foreign*, when made or payable abroad. We will first consider the form and requisites of inland bills and notes, and afterwards remark upon the incidents peculiar to those which are foreign.

FORM OF AN INLAND BILL OF EXCHANGE.

£100 " "

London, January 1, 1833.

[Stamp.] *At sight (or on demand, or at ——— days after sight, or at ——— days after date), pay to Mr. ———, or order (or bearer), one hundred pounds, for value received.*

JOHN WOOD.

*To Mr. Thomas Jones, merchant,
at Liverpool.*

(p) Goss v. Nelson, Burr. 226.

is a good note. Lovell v. Hill, 6 C. & P. 238.

(q) Colehan v. Cooke, Str. 1217.

Willes. 393.

(s) Per Lord Macclesfield, cited by L.

(r) Andrews v. Franklin, Str. 24.

Hardwicke, 2 Atk. 32. Bayley, 5th ed.

"I promise to pay, or cause to be paid,"

p. 6. Allan v. Mawsom, 4 Camp. 115.

FORM OF A PROMISSORY NOTE.

£100 „ „

London, January 1, 1833.

[Stamp.] Two months after date, I promise to pay to
Mr. —, or order, one hundred pounds, for value
received.

JOHN WOOD.

The principal parts of these instruments are the *stamp, date, time for payment, place of payment, designation of payee, name of drawer, and name of drawee*. We will consider these in order, observing first, however, that all negotiable bills or notes made in England if for less than twenty shillings, are void, stat. 48 G. 3. cap. 88. sec. 2; and if for more than twenty shillings and less than five pounds, are (with the exception of drafts by a man on his banker), also void, unless they specify the name and abode of the payee, are attested by one subscribing witness, bear date at or before the time of issue, and are made payable within twenty-one days after date, but not to bearer on demand; nor will such instrument be negotiable after the time therein limited for payment. 7 G. 4. c. 6. & 17 G. 3. cap. 30.

Stamp.—The stamp is an essential part of every inland bill and note; if unstamped, it is a nullity, and cannot be given in evidence, even as an admission of a debt from one of the parties therein mentioned to the other. (t) The paper on which a bill or note is written must have the stamp *previously* impressed upon it, for if that be neglected, it cannot afterwards be stamped, (u) except in the single case of its having been impressed with a stamp of equal or higher value, but of a

(t) Wilson v. Vysar, 4 Taunt. 228.
Jardine v. Payne, 1 B. & Ad. 670.
Cundy v. Marriott, 1 B. & Ad. 696.

Roderick v. Hovil, 3 Camp. 103. Rapp
v. Alnutt, id. 106. Green v. Davies, 4
B. & C. 235.

(u) See Wright v. Riley Peake, 173.

wrong denomination. (*w*) However, it will be sufficient if it be impressed with a stamp of adequate or greater amount, though of an improper denomination, unless such stamp be specifically appropriated to some other instrument, by having its name on the face of it. (*x*) The amount of the duty upon bills or notes is fixed by stat. 55 G. 3. cap. 184. Of the decisions which have taken place upon this act, the reader will find an excellent summary in Chitty on Bills of Exchange, 8th ed. cap. 4. The following instruments, however, need not be stamped.

1. Bills and notes issued by the Bank of England.
2. Bills drawn under certain statutes for the pay and expenses of the army and navy.
3. Bills for less than forty shillings.
4. Notes for one pound, one guinea, two pounds, and two guineas, payable to bearer on demand, issued by the Bank of Scotland, Royal Bank of Scotland, or British Linen Company in Scotland.
5. Notes payable in any other manner than to bearer on demand, for less than forty shillings.
6. Drafts or orders for the payment of money to bearer on demand, drawn in Great Britain upon any banker, or person acting as a banker, and residing, or transacting the business of a banker, within fifteen miles of the place where they are issued, provided they specify such place, and bear date on or before the day on which they are issued, and do not direct payment to be made by bills or notes.

Also by stat. 9 G. 4. c. 23. bankers, other than in London and within three miles thereof, having first obtained a licence, and given security, may issue unstamped notes for five pounds and upwards, payable to bearer on demand, or to order, at any period not exceeding seven days after sight, and bills payable

(*w*) 1 Ann. stat. 2. cap. 23. ss. 2 & 3. G. 3. cap. 136. s. 5. See Chamberlain v. Porter, 1 N. R. 30.
stat. 23 G. 3. cap. 25. s. 19. stat. 37

(*x*) 55 G. 3. cap. 184. s. 10.

to order on demand, or at any period not exceeding seven days after sight, or twenty-one days after date, provided such bills are drawn on a banker in London, Westminster, or Southwark, or provided they be drawn by a banker in a place where he is licensed to issue unstamped notes and bills upon himself or partner, payable at any other town or place where he is licensed to issue such bills or notes. But any banker licensed for that purpose must issue all his notes payable to bearer on demand on unstamped paper.

By 7 G. 4. cap. 46. sec. 16. corporations and partnerships of more than six persons, carrying on the business of bankers under that act, may issue unstamped notes, payable to bearer on demand, on giving such security as that act specifies, and are not obliged to take out more than four licences for any number of places in England, the fourth licence specifying all the places not mentioned in the other three.

Where stamp duty is payable, its amount will not be increased by the circumstance of interest being reserved from the date of the bill or note. (*y*)

Notes payable to bearer on demand, (*z*) for any sum not exceeding 100*l.*, if duly stamped, may be re-issued after payment as often as is thought fit, without further stamping, provided it be by the original issuers, or some or one of them, and if those issuers were partners, then by some one or more of them, either alone or jointly with one or more additional partners; and if such notes were at first payable elsewhere than where they were drawn, an alteration as to the place of payment will be immaterial; but no person not licensed for that purpose can issue such notes. (*a*)

Date.—The date, though a usual and convenient part of every bill and note, is not in general an essential one; for if it be omitted, the instrument dates from the day on which it

(*y*) *Pruessing v. Ing*, 4 B. & A. 204.

(*z*) 55 G. 3. c. 184. s. 15.

(*a*) *Ib.* s. 24. See *Whitlock v. Underwood*, 2 B. & C. 157.

was made. (b) Post-dating of a bill or note, in order to evade the stamp laws, is rendered a very serious offence by stat. 55 G. 3. c. 184.

Time for Payment.—When the word month is used in specifying the time of payment, it is, as in other mercantile contracts, to be understood of a calendar month.

Place of Payment.—Although, in the forms above given, no particular place of payment is specified, the drawer may, if he think proper, fix one; and if he do, a presentment must be made at the place mentioned, (c) in order to charge him with the acceptor's default; but otherwise, if it be only named in a memorandum at the foot of a promissory note, (d) though a distinction has been taken in this respect between a memorandum printed and one written. (e)

Designation of Payee.—The bill or note may be payable to a particular individual, or to a particular individual or his order, or generally to the bearer. When an individual is mentioned, a mistake in his name is of no importance, if it be sufficiently clear who was intended. (f) If the instrument be made payable to an individual, without further words, it will not be negotiable. If it be payable to an individual *or his order*, he may transfer his right to a third party, by indorsing his name upon it; if to *bearer* generally, or to a specified individual *or bearer*, it may be transferred by mere delivery; and in the last case it matters not though the individual

(b) *De la Courtier v. Bellamy*, 2 Show. 422. *Hague v. French*, 3 B. & P. 173. *Giles v. Bourne*, 6 M. & S. 73.

(c) *Roche v. Campbell*, 3 Camp. 247. *Gibb v. Mather*, 8 Bingh. 214.

(d) *Exon v. Russell*, 4 M. & S. 505. *Williams v. Waring*, 10 B. & C. 1. Vide *Hardy v. Woodroffe*, 2 Stark. 319.

Saunderson v. Judge, 2 H. Bl. 509. *Wild v. Rennard*, 1 Camp. 425. n. *Callaghan v. Aylett*, 2 Camp. 551. and the remarks on those cases in Bayley, 5th ed. 222.

(e) *Trecothick v. Edwin*, Stark. N. P. C. 468.

(f) *Rex v. Box*, 6 Taunt. 325.

named never existed, and could not possibly exist: thus a draft payable to the ship *Fortune* or bearer, is negotiable by delivery. (g) If payable to a fictitious person or his order, although no order can be made by the payee, who is not in existence, yet if the instrument be issued into the world with an indorsement in blank (the nature of which will presently be explained), purporting to be made by such fictitious person, it will as against the drawer or maker be considered payable to bearer, and so will a bill drawn in a fictitious name as against an acceptor, who knew that it was such. (h) But though a bill or note with a fictitious payee may be negotiable, yet it is not so if he be uncertain, *ex gr.*, if the instrument be payable to A. or B. (i) If a blank be left for the payee's name, any *bonâ fide* holder may insert his own, by which he will acquire all the rights of payee, and convert the instrument from a mere writing into a bill of exchange. (k)

Name of Maker or Drawer.—The name of the maker or drawer must be inserted or subscribed (l) by himself or his agent; but as there must be no uncertainty about the payee, so neither must there about the maker or drawer; thus a note must not be signed A. B., or else C. D.; (m) the name of the drawer, however, may be inscribed before it is certain what will be the exact form of the instrument, for it has been decided that he who signs his name upon a sheet of stamped paper, which he delivers to another, is liable on any bill which

(g) *Grant v. Vaughan*, Burr. 1516.

(h) *Tatlock v. Harris*, 3 T. R. 174.
Vere v. Lewis, Ibid, 182. *Minet v. Gibson*, Ibid, 481. 1 H. Bl. 569. *Collis v. Emmett*, 1 H. Bl. 313.

(i) *Blunckenhagen v. Blundell*, 2 B. & A. 417.

(k) *Cruchley v. Clarence*, 2 M. & S. 90. *Cruchley v. Mann*, 5 Taunt, 529.

Atwood v. Griffin, 1 R. & M. 425. R. v. Randall, Bayley on Bills, 5th ed. p. 37.

(l) *Taylor v. Dobbins*, Str. 399. *Elliott v. Cowper*, Str. 609. L. Raym. 1376. *Smith v. Jarvis*, Lord Raym. 1484. *Ereskin v. Murray*, Ibid. 1542.

(m) *Ferris v. Bond*, Bayley, 5th ed. 17.

that person may think fit to draw on it, and which the stamp is sufficient to cover. (n)

The following is the form of a foreign bill of exchange:—

London, January 1, 1806.

[Stamp.]

Exchange for 10,000 livres Tournoises.

At two usances (or “at sight,” or — after date”) pay this, my first bill of exchange, (second and third of the same tenor and date not paid) to Messrs. — or order, (“or bearer”) ten thousand livres Tournoises, value received of them, and place the same to account, as per advice from

JAMES OATLAND.

To Mr. —, at Paris.

payable at

Foreign bills are usually drawn in *sets*, that is, copies of the bills are made on separate pieces of paper, each part containing a condition that it shall continue payable only so long as the others remain unpaid, a method, the adoption of which considerably diminishes the chances of losing the bill. Bills drawn in England on a foreign country must be stamped as directed by stat. 55 G. 3. cap. 184. sch. I; and by the same act, sec. 29. promissory notes payable to bearer on demand, made or purporting to be made by or on behalf of any person resident out of Great Britain, except when made and payable in Ireland only, cannot be negotiated here unless they be stamped in like manner as notes of the same tenor and value made in Great Britain, under penalty of 20*l*.

But bills *drawn* in a foreign country, or at sea, require no stamp under any English act of Parliament; (o) and where a person resident at Antwerp desired his correspondent in England to fill up a bill of exchange, and return it to him, which

(n) *Collis v. Emett*, 1 H. Bl. 313. *Cruchley v. Mann*, 5 Taunt. 529. See

(o) *Boehm v. Campbell*, Gow. N.P.C. *Ximenes v. Jaques*, 1 Esp. 311.

56. *Snaith v. Mingay*, 1 M. & S. 87.

was done, and he then signed it as drawer at Antwerp, this bill was held to have been virtually drawn abroad, and to require no stamp. (*p*) And though the foreign country where the bill was drawn may have a law requiring it to bear a particular stamp, it will nevertheless be valid in this country without such stamp, for our Courts take no notice of the revenue laws of another state. (*q*) But if the bill be drawn or note made in a British possession abroad, the local law of which requires it to be stamped, it will not be available here unless so stamped. (*r*) But such local law must be proved by the party who relies on it. (*s*)

SECTION II.—*Parties to a Bill or Note.*

The parties to a bill or note, must of course be such as would be capable of entering into any other contract. Thus, an infant ought not to be one; (*t*) even though the instrument be given for necessities. (*u*) Neither ought a *feme covert*, (*v*) unless she act as agent for her husband, (*w*) or he be under a civil incapacity of residing here. (*x*) But where a married woman being administratrix, lent to her husband a sum of money which she had received in that character, and took for it the joint and several promissory note of her husband and two other persons, payable to her with interest, the Court of King's Bench held, though she could not have sued

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| (<i>p</i>) Boehm <i>v.</i> Campbell. | 3 Salk. 197. Gibbs <i>v.</i> Merrell, 3 Taunt. |
| (<i>q</i>) James <i>v.</i> Catherwood, 3 D. & R. | 307. |
| 190. | (<i>u</i>) Williamson <i>v.</i> Watts, 1 Camp. |
| (<i>r</i>) Alves <i>v.</i> Hodgson, 7 T. R. 241. | 552. Trueman <i>v.</i> Hurst, 1 T. R. 40. |
| (<i>s</i>) Buchanan <i>v.</i> Rucker, 1 Camp. | (<i>v</i>) Marshall <i>v.</i> Rutten, 8 T. R. 545. |
| 65. Le Cheminant <i>v.</i> Pearson, 4 Taunt. | Caudell <i>v.</i> Shaw, 4 T. R. 361. |
| 367. Millar <i>v.</i> Heinrick, 4 Camp. | (<i>w</i>) Cotes <i>v.</i> Davis, 1 Camp. 485. |
| 155. | Prestwick <i>v.</i> Marshall, 7 Bingh. 567. |
| (<i>t</i>) Williams <i>v.</i> Harrison, Carth. 160. | (<i>x</i>) Derry <i>v.</i> Duchess of Mazarine, |
| | Ld. Raym. 147. |

on it in her husband's lifetime, yet, that any time within six years after his death she might. (y) However, if a bill or note be made payable, or indorsed, to a *feme coverte*, her husband may either negotiate or sue upon it, and that either in his own name, or jointly with his wife. (z) The effect of bills and notes, to which agents, mercantile corporations, or firms are parties, has been already discussed in the first book, under those respective heads. It will however be proper in this place to mention some peculiar rules respecting *banking corporations and partnerships*, who, together with bankers carrying on business individually, have been the objects of certain special legislative enactments.

There are three classes of banks existing in England—

1. The Bank of England.
2. Banks of fewer than six persons.
3. Banking corporations, and companies of more than six persons.

On all these, the restrictions on the issue of bills or notes under twenty shillings and above twenty shillings but less than five pounds, imposed by stat. 7 G. 4. c. 6.; and 17 G. 3. c. 30., and described in a former part of this chapter, are of course binding as well as on the rest of his majesty's subjects.

Subject to these regulations—

1. *The Bank of England*, which is a corporation, (a) enjoying privileges, determinable upon one years' notice, given at the end of ten years after 1st August 1834; (b) can issue bills or notes to any amount *unstamped*; has the exclusive privilege of doing so within three miles of London, (c) and may re-issue its notes after payment thereof, *ad libitum*. (d) Its notes

(y) *Richards v. Richards*, 2 B. & Ad. 447.

(z) *Arnold v. Revoult*, 1 B. & B. 443. *Philliskirk v. Pluckwell*, 2 M. & S. 393.

(a) 39 & 40 G. 3. c. 28. s. 15.; 3 & 4 W. 4. c. 98. s. 1.

(b) 3 & 4 W. 4. c. 98. s. 5.

(c) 9 G. 4. c. 23. s. 1.

(d) 55 G. 3. c. 184. s. 20.

payable *to bearer on demand*, are, like cash, a legal tender, except at the bank itself, or its branches. (e) Such notes, if issued out of London, must be made payable where issued. (f) An account of its assets and liabilities must be transmitted weekly to the Chancellor of the Exchequer, and published quarterly in the London Gazette. (g)

2. *Banks of fewer than six persons* may issue bills and notes like any private man, and may, (except within the city of London, or within three miles thereof,) having first obtained a licence, and given security by bond, issue *on unstamped paper* promissory notes for five pounds or upwards, payable *to bearer on demand*, or *to order*, at any period not exceeding seven days after sight, and also draw and issue *on unstamped paper*, bills of exchange, payable *to order on demand*, or any period not exceeding seven days after sight, or twenty-one days after date, provided such bills of exchange be drawn on a bank in London, Westminster, or Southwark, or be drawn by a banker, or bankers, at a town or place where he or they shall be duly licensed to issue unstamped notes and bills upon himself, or themselves, or his or their copartner or copartners, payable at any other town or place where such banker or bankers shall also be duly licensed to issue such notes and bills, as aforesaid. (h)

They must return quarterly accounts of the average amount of their notes payable to bearer on demand in circulation during the preceding quarter to the Chancellor of the Exchequer, under the penalty of 500*l.*, which accounts are to be verified on oath. (i)

Banking (k) corporations and companies of more than six persons, are forbidden to issue in London, or within sixty-five

(e) 3 & 4 W. 4. c. 98. s. 6.

(f) Ibid. s. 4.

(g) Ibid. s. 8.

(h) 9 G. 4. c. 23. s. 1.

(i) Stat. 3 & 4 W. 4. c. 83. s. 1.

(k) Stat. 3 & 4 W. 4. c. 98. s. 2.

See Chitty, 8 Ed. p. 19. Wigan v. Fowler, 1 Stark. 459. 2 Chitt. 128. Harvey v. Kay, 9 B. & C. 363. Perring v. Dunstan, 1 R. & M. 426.

miles thereof, any bill or note, for the payment of money on demand. (*l*) Such a corporation or company, however, having an establishment more than sixty-five miles from London, may issue bills or notes, payable on demand or otherwise at the place where they are issued and also at London, (*m*) and have an agent in London, or any other place where the same shall be made payable, for the purpose of such payment only. But no such bill or note shall be for less than five pounds, or be re-issued in London, or within sixty-five miles thereof.

Even beyond the distance of sixty-five miles from London, such a corporation or company can only issue such bills or notes, subject to the regulations prescribed by stat. 7 G. 4. c. 46., which directs that their bills and notes, shall be made payable at some place or places specified thereon, exceeding the limited distance, (subject however to the licence given by 3 & 4 W. 4. c. 98. s. 2.; and 3 & 4 W. 4. c. 83. s. 2.) that the corporation or copartnership shall have no establishment as bankers in London, or within sixty-five miles thereof, that every member of such corporation or partnership shall be responsible for the payment of bills and notes issued by the corporation or partnership, such person being a member at the date of the bills or notes, or becoming so before they are payable, or while any sum on any of them is unpaid; and that they shall deliver into the stamp-office, before they issue any bills or notes, and every year afterwards, between February 28th and March 25th, an account in form specified in a schedule to the act, which account sets forth the true name of the corporation or partnership, and of every bank established by them, and the names and abode of two members resident in England, who have been appointed public officers of the corporation or partnership. A further account is also to be delivered within the year, if there be any change in the officers or members.

(*l*) Or it would seem from s. 3., at any less time than six months.

(*m*) 3 & 4 W. 4. c. 98. s. 2.; and 3 & 4 W. 4. c. 83. s. 2.

The copartnership is to sue and be sued in the names of any one of the abovementioned officers, of whose appointment, though it may be otherwise proved, (n) a copy of the account certified under the hand of one of the commissioners of stamps, is evidence; this copy also proves, that all persons named therein were members at the period of its date. A decree or judgment against such public officer binds the copartnership, and execution may be taken out against any member for the time being, and if that prove ineffectual, against any person who was a member at the time of the contract, or became a member before it was executed, or was a member at the time of the judgment obtained; but no such execution as last mentioned can be issued, without leave first granted on motion in open Court, which motion cannot be made without notice to the party sought to be charged, nor more than three years after he has ceased to be a member.

They are also obliged to send in the quarterly account, required by stat. 2 & 3 W. 4. c. 83., and the nature of which is above described.

When several persons who are not in partnership accept a bill, or make a promissory note, the question whether they are bound jointly, or jointly and severally, depends upon the wording of the instrument. A note beginning with "*I promise*," and signed by several persons, has been held joint and several. (o) In no case will the signature of one of such makers, or drawees, bind any person except himself; (p) nor if such persons be payees, can any one of them transfer the bill or note by his individual indorsement. (q) An executor, or administrator becoming party to a bill or note, binds himself personally. (r)

(n) *Edwards v. Buchanan*, 3 B. & Ad. 790.

(o) *Clark v. Blackstock*, Holt. 474. *March v. Ward*, Peake 130. *Lord Galway v. Matthew*, 1 Camp. 403. 10 East. 264.

(p) B. N. P. 279. *Marius*, 2d ed. 16. *Beawes*, 1st Ed. 444.

(q) *Carvick v. Vickery*, Dougl. 653. n. 134.

(r) *Ridout v. Bristow*, 1 Tyrwh. 90. *Childs v. Monims*, 2 B. & B. 460.

SECTION III.—*Transfer of Bills and Notes.*

Although, by the ordinary rule of law, the benefit of contracts cannot be transferred, so as to give the transferee a right to sue *at law* upon them in his own name; yet those arising out of bills and notes, generally speaking may be so, in the manner hereinafter specified; and though it once was doubted whether an English note were transferable *abroad*, it has been since decided that it is so. (s)

A bill or note payable to bearer, or indorsed in blank, may be transferred by mere delivery. Other bills and notes, by the indorsement of the transferor's name on the instrument. (t) Indeed, if the bill or note be for less than five pounds, the indorsement must mention the name and place of abode of the indorsee, bear date at or before the time of making it, and be attested by a subscribing witness. (u)

Indorsements are either full or in blank; a full indorsement is one which mentions the name of the party in whose favour it was made. An indorsement in blank one which does not mention such name.

A bill or note indorsed in blank is, as has been said, transferable by merely delivering it to the intended transferee, but one indorsed in full, must be indorsed again by the person to whom it was so indorsed in full, in order to render it transferable to every intent, for he who indorses to a particular person, declares his intention not to be made liable, except by that person's indorsement over. Indeed, where a bill was indorsed in blank by the payee, and after other indorsements specially indorsed to Jackson, who delivered it without in-

(s) *De la Chaumette v. B. of England*, 2 B. & Ad. 385.

(t) Which indorsement may be written in pencil as well as ink. *Geary v. Physic*, 5 B. & C. 234.

(u) 17 G 3. c. 30. s. 1. By the French law, an indorsement must specify the value given and the indorsee's name, and must be dated. *Trimbey v. Vignier*, 6 C. & P. 30.

dorsement to Muir and Atkinson, who discounted it with the plaintiff; Lord Kenyon allowed the plaintiff to strike out all the indorsements, except that by the payee, and recover in an action on it against the acceptor. (w) An indorsement may be so worded, as to restrain the negotiability of the instrument, and is then called a *restrictive* indorsement; thus, "pay the contents to J. S. only," or "to J. S. for my use," are restrictive indorsements, and put an end to the instrument's transferability. (x) But in such case there must appear an unequivocal intention to restrain, (y) therefore an *indorsement* in full to A. without the words "or order," will not deprive A. of the power of transferring by his indorsement. (z) An indorsement cannot be for part of the sum secured by the bill or note, if the residue continue unpaid, (for that would subject the previous parties to a variety of suits,) though it seems that if the residue be paid it may. (a) Where the drawer or maker, has, in the original wording of a bill or note, rendered it payable to an individual, without adding words of transfer such as "*or order*," it is, as we have seen, not transferable. However, if the holder of such a bill think proper to indorse it, *he* will be chargeable on his indorsement, though antecedent parties to the instrument will not. (b)

Such is the mode of transferring a bill or note, which transfer may in general be made by any holder, or his legal representative; as, if the holder die, by his executors or administrators, (c) if he become bankrupt, by his assignees, unless

(w) *Smith v. Clark*, Peake 225.

(x) Per Wilmot J., *Burr.* 1227. *Bl.* 229. See *Robertson v. Kensington*, 4 *Taunt.* 30. *Sigourney v. Lloyd*, 8 *B. & C.* 622. *Ancher v. B. of England*, *Dougl.* 615. 637. Similar to a restrictive indorsement is the common practice which will be hereafter noticed, of writing the name of the payee's banker across a cheque.

(y) *Treuttel v. Barandon*, 8 *Taunt.* 100. *Potter v. Reed*, 6 *Esp.* 57.

(z) *Moore v. Manning*, *Com.* 311.

Acheson v. Fountain, *Str.* 557. *B. N. P.* 275. *Edie v. E. I. Compy.*, *Bl.* 295. *Burr.* 1216.

(a) *Hawkins v. Cardy*, *Ld. Raym.* 360. *Carth.* 466. 12 *Mod.* 213. *Salk.* 65. *Johnson v. Kennion*, 2 *Wils.* 262. per Gould J.

(b) *Hill v. Lewis*, *Salk.* 132.

(c) *Rawlinson v. Stone*, 3 *Wils.* 1.

under particular circumstances, as where the bankrupt held the bill in the character of trustee or agent for another person; (*d*) and if the holder of a bill or note marry, the right to transfer it devolves upon her husband. (*e*) But persons holding bills *in auter droit*, should exercise this power of transfer with much caution, for unless they by some special form of words prevent such liability, they will be personally bound by their indorsement. (*f*) When a bill or note is lost or stolen, a thief or finder can of course convey no title in it to any other person, if at the time of the loss it be transferrable only by indorsement; and if it be transferrable by mere delivery, although the thief or finder may convey a title in it to any person acquiring it from him, *bonâ fide*, and for a valuable consideration, (*g*) yet, if such person take it without sufficient caution, and under circumstances which should have led him to suspect the true state of the case, he will not be allowed to retain it, even though he have given its full value. (*h*)

As to the *time* at which a bill or note may be transferred, it

(*d*) *Ramsbottom v. Cator*, 1 Stark. 228. *Exp. M'Gae*, 2 Rose, 376. 19 Ves. 607. *Arden v. Watkins*, 3 East, 317. *Willis v. Freeman*, 12 East, 656. *Gladstone v. Hadwen*, 1 M. & S. 517. *Bruce v. Hurley*, 1 Stark. 23. *Exp. Smith*, 1 Buck. 355. *Zinck v. Walker*, Bl. 1154. *Giles v. Perkins*, 9 East, 12. *Exp. Rowton*, 1 Rose, 15. *Exp. Seargeant*, 1 Rose, 153. *Exp. Hull in re Boldero*, 19 Ves. 25. 1 Rose, 232. *Exp. Twogood*, 19 Ves. 229. *Exp. Buchanan*, 1 Rose 280. *Exp. Harford*, 2 Rose, 162. *Exp. Armestead*, 2 Glynn & Ja. 371. *Thompson v. Giles*, 2 B. & C. 422. and post, Book 4. Chapter, Bankruptcy.

(*e*) *M'Neilage v. Holloway*, 1 B. & A. 218. *Connor v. Martin*, Str. 516.

(*f*) *Childs v. Monims*, 2 B & B. 460.

King v. Thom, 1 T. R. 487. *Goupy v. Harden*, Holt, 342. 2 Marsh. 404. 7 Taunt. 159. *Eaton v. Bell*, 5 B & A. 34. *Thomas v. Bishop*, Str. 955.

(*g*) *Anon Ld.* Raym. 738. Salk. 126. 3 Salk. 71. *Miller v. Race*, Burr. 452. *Lawson v. Weston*, 4 Esp. 56. *Grant v. Vaughan*, Burr. 1516. *Peacock v. Rhodes*, Dougl. 611. 633. *Snow v. Saddler*, 3 Bingham. 610.

(*h*) *Strange v. Wigney*, 6 Bingham. 683. *Solomons v. Bank of England*, 13 East. 135. *Gill v. Cubitt*, 3 B. & C. 466. *Down v. Halling*, 4 B. & C. 330. *Snow v. Peacock*, 3 Bingham. 406. *Beckwith v. Corral*, 3 Bingham. 444. *Easley v. Crockford*, 10 Bingham. 245. *Egan v. Threllfall*, 5 D. & R. 326 n.

may be so either before or after (*i*) it has become due. (*k*) But then a person who takes a bill *after* it is due, or with notice of its having been dishonoured by non-acceptance, takes it subject to all the equities with which it was encumbered while in the hands of the person from whom he received it, for it comes, to use Lord Ellenborough's words *disgraced* to him; thus, if it had been accepted for that person's accommodation, he would not be able to recover on it against the acceptor. So if he took it from a thief or finder, he could not recover on it, inasmuch as the thief or finder could not. (*l*) But these equities, as they are called, must be such as naturally arise out of the bill or note transaction, not out of some collateral matter, as for instance, a right of set-off, which the maker or acceptor would have had against the party who transferred it to the holder. (*m*)

But though a bill or note is, generally speaking, negotiable after it has become due; yet it is not so after it has once been *paid*, if such negotiation would have the effect of charging persons who otherwise would be discharged. (*n*) However an indorser, who pays a bill as such, may afterwards negotiate

(*i*) Unless it be for less than 5*l.*, 17 G. 3. c. 30. s. 1.

(*k*) *Dehers v. Harriott*, 1 Shower 163. *Mutford v. Walcott*, Lord Raym. 575. *Charles v. Marsden*, 1 Taunt. 224. *Graves v. Key*, 3 B. & Ad. 318.

(*l*) *Taylor v. Mather*, 3 T. R. 83 n. *Brown v. Davies*, 3 T. R. 80. *Boehm v. Stirling*, 7 T. R. 431. *Tinson v. Francis*, Selw. N. P. 8th ed. 321. *Crossley v. Ham*, 13 East. 498. *Lee v. Zagury*, 8 Taunt. 114. *Beachamp v. Parry*, 1 B. & Ad. 91. per Lord Tenterden. But a bill or note payable on demand, especially if with interest, is not considered over-due, without some evidence of payment having been demanded and refused.

Barrough v. White, 4 B. & C. 325. 2 C. & P. 8. See *Heywood v. Watson*, 4 Bingham. 560. *Gascoyne v. Smith*, McClell. & Y. 338. Sed vide *Banks v. Colwell*, 3 T. R. 81.

(*m*) *Borough v. Moss*, 10 B. & C. 558. As to the limit of the above rule in other respects, see *Chalmers v. Lanyon*, 1 Camp. 383. *Bosanquet v. Dudman*, 1 Stark. 1. *Attwood v. Crowdie*, 1 Stark. 483. *Buzzard v. Flecknoe*, 1 Stark. 333. *Collenridge v. Farquharson*, 1 Stark. 259. *Dunn v. O'Keefe*, 6 Taunt. 305. affirmed, 5 M. & S. 282. in Error.

(*n*) *Beck v. Robley*, cited 1 H. Bl. 89 n.

it, for his indorsement can give no right save against himself, and those whom he himself might sue. (o)

Lastly. It is to be observed on the subject of transfer, that the party who indorses, undertakes thereby to the indorsee and every subsequent holder, that the bill or note shall be discharged by the drawee or maker when it becomes due. The transfer of a bill or note by mere delivery, raises no such undertaking on the part of the transferor: (p) however, if such transfer was by way of payment of a former debt, that debt will not be looked upon as satisfied, unless the bill or note be discharged when it comes to maturity. An indorsement admits the ability and signature of every antecedent party. (q).

SECTION IV.—Acceptance.

It has been already stated, that he who draws a bill undertakes thereby that the drawee shall, when requested, accept, that is, *engage* to pay it; the request made for this purpose by the holder to the drawee, is called a *presentment for acceptance*.

(o) *Callow v. Lawrence*, 3 M. & S. 95. *Hubbard v. Jackson*, 4 Bingh. 390. *Graves v. Key*, 3 B. & Ad. 316.

(p) Such transfer by delivery, if for valuable consideration, seems to imply a warranty, that the bill or note is genuine. *Jones v. Ryde*, 5 Taunt. 488. *Bruce v. Bruce*, 1 Marsh. 165. It has been questioned whether the transfer of a note, payable to bearer by delivery, do not imply a warranty, that the maker of the note is solvent at the time of such delivery. But the general opinion seems against such implication; see the subject discussed in *Rogers v. Langford*, 1 Cr. & Mees. 637.

(q) *Lambert v. Pack*, Sal. 127. *Id.*

Raym. 443. 12 Mod. 244. Holt. 117. *Williams v. Seagrove*, 2 Barnard. 82. *Cricblow v. Parry*, 2 Camp. 182. But an indorsement seems to be no warranty that prior indorsements are genuine. *E. I. Compy. v. Tritton*, 3 B. & C. 280. It has been said that an indorsement in blank is an equivocal act: and if a man indorse a bill in blank, and give it to his agent to obtain payment, that agent may either use his principal's signature to discharge the party paying, by writing a receipt over it; or may consider it a transfer of the right of action on the bill to himself. *Clark v. Pigot*, Sal. 126. 12 Mod. 192. *Adams v. Oakes*, 6 C. & P. 71.

As there is no drawee in a note, there can of course be no such *presentment*, though when a note is payable within a certain time *after sight*, it must be *presented* to the maker, in order that such time may begin to run. (r)

This *acceptance*, which may, it seems, at least in most cases, be made before the bill is actually drawn, (s) and which will bind the acceptor, though not made till after the time appointed for payment, (t) may in case of a foreign bill, be either verbal or in writing; (u) and Ireland is for this purpose to be considered a country foreign to England, even since the Union. (v) But by stat. 1 & 2 G. 4. c. 78. s. 2., the acceptance of an inland bill must be in writing on the bill; and though a bill drawn in Ireland on a person in England, or *vice versâ*, is as we have just seen, not an inland bill within this act, yet a bill drawn in Ireland on another person also in Ireland is, and the same rules prevail respecting Scotland. (w) No particular form is necessary to make an acceptance by the drawee, it need not even be signed by him; (x) any expressions indicative of his intention to pay the bill when due, will be sufficient. Indeed, so liberal are the courts in construing acceptances, that the words "presented," "seen," or "the day of the month," if written upon the bill, *primâ facie* amount to acceptances. (y) Similar liberality is used in construing verbal acceptances. (z) A promise to accept a bill *already drawn* upon

(r) *Sturdy v. Henderson*, 4 B. & A. 592.

(s) *Pillans v. Van Mierop*, Burr. 1663. *Mason v. Hunt*, Dougl. 284. 297. Sed vide *Johnson v. Collings*, 1 East, 98.

(t) *Jackson v. Piggott*, Ld. Raym. 364. *Mutford v. Walcot*, Ld. Raym. 574. Sal. 129.

(u) *Lumley v. Palmer*, Str. 1000. *Julian v. Shobrook*, 2 Wils. 9. *Powell v. Monnier*, 1 Atk. 612. *Pillans v. Van Mierop*, Burr. 1662. *Sproat v. Matthews*, 1 T. R. 182.

(v) *Mahoney v. Aslin*, 2 B. & Ad. 478.

(w) *Mahoney v. Aslin*, ubi supra.

(x) *Dufaur v. Oxenden*, 1 M. & Rob. 90.

(y) Anon. Comb. 401. per Holt. Vide *Powell v. Monnier*, 1 Atk. 611. *Moor v. Whitby*, B. N. P. 270. *Dufaur v. Oxenden*, 1 M. & Rob. 90.

(z) See *Mendizabal v. Machado*, 6 Carr. & P. 218. an extremely strong case.

an executed consideration, (a) or that the bill "shall meet with due honour," (b) or that the drawee will accept, or certainly pay the bill, (c) have been held to amount to acceptances. However, though a promise to accept a non-existing bill, may possibly amount to an acceptance, if some person be thereby influenced to take the bill, (d) yet it will not in any other case; (e) and a promise by the drawee to the drawer, who was not the payee, that the bill "should have attention," is no acceptance, unless in the course of dealings it had usually been considered such; (f) and there are other cases, each depending on its own peculiar circumstances, in which equivocal words have been held not to amount to acceptance. (g)

There are some cases in which mere acts of the drawee, such as keeping or destroying the bill, may amount to acceptance; (h) though such their tendency may be explained away by other circumstances. (i)

An acceptance may be either absolute or conditional.

A *conditional acceptance* becomes available when the condition is performed, (k) and not before; (l) for though the bill must, as we have seen, be drawn for the payment of the sum mentioned in it, *unconditionally*, and the payee may therefore, if he think proper, refuse to take an acceptance *upon*

(a) Pillans v. Van Mierop, Burr. 1662. See Mason v. Hunt, Dougl. 284. 297. Pierson v. Dunlop, Cowp. 571.

(b) Clark v. Cock, 4 East, 57. See Pierson v. Dunlop.

(c) Wynne v. Raikes, 5 East, 514. See on this subject Fairlee v. Herring, 3 Bingh. 625. Powell v. Monnier, 1 Atk. 611. Miln v. Prest, 4 Camp. 393. Holt, 181. Wilkinson v. Lutwidge, Str. 648.

(d) Pierson v. Dunlop. Mason v. Hunt, supra.

(e) Johnson v. Collings, 1 East, 98.

(f) Rees v. Warwick, 2 B. & A. 113. 2 Stark. 411.

(g) See Powell v. Jones, Esp. 17. Anderson v. Hicks, 3 Camp. 179. Anderson v. Heath, 4 M. & S. 303.

(h) Bayley on Bills, 5th ed. 191, 2, 3.

(i) Ibid.

(k) Pierson v. Dunlop, Cowp. 571. Miln v. Prest, Holt, 181. 4 Camp. 393.

(l) Banbury v. Lisset, Str. 1211.

Sproat v. Matthews, 1 T. R. 182.

condition; yet if he do take such acceptance, he must abide by it. (m)

As an acceptance may vary from the tenor of the order, by introducing a condition, so it may vary from it as to the *sum*, *time*, *place*, or *mode* of payment; (n) and if the holder think proper to take any such acceptance, he will be bound by it, though he has a right to require one in writing, conformable to the tenor of the order; specifying, if none be mentioned, a place for its payment, and mentioning the time of presentment, if it be payable after sight. (o)

An acceptance once completed and issued, cannot be revoked, but before issue it may. (p) It admits the drawer's ability to make the bill, (q) and if made after sight of the bill his signature, (r) but not the ability or signature of an indorser, though his name were on the bill at the time of acceptance; (s) and even though the drawer and indorser were the same person, and the bill was payable to his order, it does not admit his handwriting on the indorsement, (t) though it does his ability to indorse, (u) and if such a bill purport to be drawn and indorsed by procuration, it admits only the former procuration, not the latter. (v)

There is a peculiar species of acceptance called *Acceptance for Honour*. This happens when, in order to promote the ne-

(m) *Smith v. Abbott*, Str. 1152. *Julian v. Shobrook*, 2 Wils. 9. See *Mitchell v. Baring*, 10 B. & C. 11.

(n) See Bayley on Bills, 5th ed. 199.

(o) Bayley on Bills, 5th ed. 202, 3.

(p) *Marius* 20. *Cox v. Troy*, 5 B. & A. 474. See *Bentinck v. Dorrein*, 6 East, 199.

(q) *Porthouse v. Parker*, 1 Camp. 82.

(r) *Wilkinson v. Lutwidge*, Str. 648. *Jenny v. Fowler*, *ibid.* 946.

(s) *Smith v. Chester*, 1 T. R. 654. *Carvick v. Vickery*, Dougl. 630.

(t) *Robinson v. Yarrow*, 7 Taunt. 455., but where the drawer is a fictitious person, the acceptor's undertaking is, that he will pay to the signature of the same person who signed for the drawer. *Cooper v. Meyer*, 10 B. & C. 471.

(u) *Taylor v. Croker*, 4 Esp. 187. *Bass v. Clive*, 4 M. & S. 13.

(v) *Robinson v. Yarrow*, 7 Taunt. 455.

gotiation of the bill, or save the credit of the drawer or some other party thereto, in a case where the drawee is not to be found, or cannot, or will not accept, or after he has accepted, absconds, or becomes bankrupt, a stranger thinks fit to accept the bill for the honour of some one of the parties thereto, which acceptance will enure to the benefit of all the parties subsequent to him for whose honour it was made (*w*) and whose name it generally specifies, if it do not, it is considered to be for the honour of the drawer. (*x*) A bill accepted for the honour of some one of the parties to it, may be again accepted for the honour of another. (*y*) In saying that this kind of acceptance is by a *stranger*, I mean by a person not acting in the character of drawee, or in compliance with the drawer's order, for the drawee himself may accept for the honour of an indorser. (*z*) But in no case is the holder obliged to take an acceptance for honour. (*a*)

Such an acceptance is a conditional undertaking to pay, if the drawee do not: it is equivalent to saying to the holder "Keep the bill; do not return it; and when the time arrives at which it ought to be paid, if it be not paid by the party on whom it is drawn, come to me, and you shall have the money." In order, therefore, to complete the liability of the acceptor for honour, the bill must be presented for payment when it falls due, notwithstanding the former refusal of the drawee, who may possibly in the mean time have received assets. (*b*) This presentment must, according to Mr. Chitty, (*c*) be made in cases of bills payable after date, on the day on which they would fall due according to their date; but in

(*w*) Bayley, 5th ed. 176. Beawes 33. Marius 21. Exp. Wackenbarth, 5 Ves. 574.

(*x*) Beawes, 39.

(*y*) Beawes, 42. 2 Camp. 448 n.

(*z*) Bayley, 5th ed. 177.

(*a*) Mutford v. Wolcot, 12 Mod. 410.

Ld. Raym. 575. Beawes, 37. Gregory

v. Walcup, Com. 76. Pillans v. Van Mierop, Burr. 1663.

(*b*) Williams v. Germaine, 7 B. & C. 477. Hoare v. Cazenove, 16 East, 391. Mitchell v. Baring, 10 B. & C. 4. 1 M. & M. 381. See Brunetti v. Lewin, Lutw. 896.

(*c*) Chitty on Bills, 8th ed. 380.

that of a bill payable after sight, upon the day on which it would fall due, reckoning from the acceptance for honour, and adding the three days of grace. (d) Notice of the non-payment must also be given within due time to the acceptor for honour, otherwise he will be discharged. (e) An acceptance for honour made after the bill has been protested, is called an *acceptance supra protest*, and care must be taken, at least in the case of a foreign bill, that such protest be made previous to either acceptance or payment for honour. (f) The nature of a *protest* will be hereafter explained.

The acceptor for honour has his remedy against the party for whose honour he accepts, and all whom that party might have sued, (g) and therefore against the drawee, if he had accepted. But if the drawee accepted for the drawer's accommodation, and both drawer and drawee have become bankrupt, he must first seek his remedy against the estate of the latter. (h)

Unless for honour, there can be no second acceptance: if such a one be written on the bill it is a guaranty, and may, when duly stamped, be sued upon as such. (i) Indeed, if the drawee of a foreign bill accept two sets, he may perhaps be sued by the holder of each of them. (k)

(d) Williams v. Germaine, supra.

Ves. 179. Exp. Wackenbarth, 5 Ves. 574.

(e) Williams v. Germaine, Mitchell v. Baring, ubi supra.

(h) Exp. Wackenbarth, ubi supra.

(f) Vandewall and another v. Tyrrell, 1 M. & M. 87. Bayley, 5th ed. 180.

(i) Jackson v. Hudson, 2 Camp. 447.

(g) Beawes, 47. Smith v. Nissen, 1 T. R. 269. See exp. Lambert, 13

(k) See Holdsworth v. Hunter, 10 B. & C. 451. Perreira v. Jopp, there cited.

SECTION V.—*Presentment.*

Every holder of a bill or note ought to present it in due time, for *acceptance*, if necessary, in all cases for payment, and to give notice if it be dishonoured to every party who would be entitled to bring an action on paying it, and whom a default in any one of these particulars will discharge. Indeed if the maker or drawee abscond, or the house at which the bill or note was drawn payable be found shut up, it may be treated as dishonoured, (*l*) but care must be taken that he have *absconded*, not merely *removed*. (*m*) Nor is his bankruptcy, insolvency, or stopping payment, any excuse for the want of presentment and notice. (*n*)

The principal circumstances concerning presentment, are *the person to whom, the place where, and the time when* it is to be made.

Generally speaking, the presentment should be *to the maker or drawee*; but if a bill or note be payable at a particular banker's, a presentment at that banker's is sufficient; (*o*) if at a particular place, a presentment at all the banking-houses in that place. (*p*) If the maker or drawee be dead, the presentment must be to his personal representative; (*q*) if he be absent, and the bill or note was made or accepted by agent, to that agent. (*r*)

With respect to the *place of presentment*, we have already seen that if the bill or note specify a particular place for

(*l*) Anon. L. Raym. 743. Hardy v. Woodroffe, 2 Star. 319. Hine v. Allely, 4 B. & Ad. 624.

(*m*) Collins v. Butler, Str. 1087.

(*n*) Russell v. Langstaffe, Doug. 497. 515. per Lee, J. Esdaile v. Sowerby, 11 East, 114. Laffitte v. Slatter, 6 Bingh. 623. Bayley, 5th ed. 252. Bowes v. Horn, 5 Taunt. 30. See

Rogers v. Langford, 1 Cr. & Mee. 639., and Camidge v. Allenby, 6 B. & C. 373.

(*o*) Saunderson v. Judge, 2 H. Bl.

509. Harris v. Packer, 3 Tyrwh. 370.

(*p*) Hardy v. Woodroffe, 2 Stark. 319.

(*q*) Molloy, B. 2. c. 10. s. 34.

(*r*) Phillips v. Astling, 2 Taunt. 206.

Bayley, 5th ed. 219.

payment, it must be presented there ; (s) and before stat. 1 & 2 Geo. 4. c. 78. s. 1. if such place had been pointed out by the acceptance, a presentment there would have been necessary to charge either the drawer or acceptor. (t) By stat. 1 & 2 Geo. 4. c. 78. s. 1. "if any person shall accept a bill payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed to all intents and purposes a general acceptance of such bill ; but if the acceptor shall in his acceptance express that he accepts the bill, payable at a banker's house, or other place *only*, and *not otherwise*, or *elsewhere*, such acceptance shall be deemed to be to all intents and purposes a qualified acceptance, and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been duly demanded at such banker's house or other place."

Since this statute it has been decided that in an action against the *acceptor*, on a bill payable *payable by the language of the bill*, at a particular place, a presentment at that place need not be averred or proved, the statute applying equally whether the bill be made payable at a particular place by the drawer, or by the acceptor. (u)

But that where the drawer directs by the body of the bill that the money shall be payable at a particular place, a presentment at that place must be proved in an action against *him* ; (w) for that the statute, to use the words of Tindal, C. J. "neither intended to alter, nor has in any manner altered, the liability of drawers of bills of exchange, but is confined in its operation to the case of acceptors alone."

It has been doubted whether, if a bill be *accepted* payable at a particular place, the indorsee must prove a presentment at that place *in order to charge the drawer or indorser*. Some of

(s) If it be payable at two places, the holder has his option at which to present it. *Beeching v. Gower*, Holt, 313.

(t) *Rowe v. Young*, 2 B. & B. 165.

(u) *Selby v. Eden*, 3 Bing. 611. *Fayle v. Bird*. 6 B. & C. 531.

(w) *Gibbs v. Mather* in Cam. Scacc. 8 Bingh. 221.

the words of the Chief Justice in *Gibb v. Mather*, appear to warrant that conclusion. In *Park v. Edge* (x) the point was raised, but not settled; that case deciding only that the indorsee need not aver such a presentment in his declaration against the drawer or indorser; but may prove it if necessary under the allegation of a general presentment. It seems to have been taken for granted in that case, and has been expressly held at N. P. (y) that a presentment at the place named in such acceptance is, since the statute, as before, sufficient to charge the drawer or indorser: supposing it to be so, the acceptance must still be proved, in order to warrant a presentment at the place therein named, instead of to the acceptor personally, or at his residence. (z)

The time for presentment must be considered with reference, 1st, to a presentment for acceptance; 2dly, to one for payment.

We have already seen the nature of a presentment for acceptance; it is necessary in all cases of bills payable after sight; and in cases of other bills, although not necessary, is usual and prudent; since the holder, if he succeed in obtaining it, gains the additional security of the drawee, while, if he fail, his remedy against the drawer is accelerated.

Where presentment for acceptance is necessary it must be made within a reasonable time; what is such reasonable time, depends upon the circumstances of each case. (a) No delay warranted by the ordinary course of business is unreasonable; and therefore bills drawn by a country banker upon London, may by the course of dealing be retainable as part of the circulating medium of the country, for a longer period than they would if drawn under other circumstances. (b) So with respect to bills payable abroad after sight, in the absence of any posi-

(x) 1 Cr. & Mee. 434.

(a) *Fry v. Hill*, 7 Taunt. 397.

(y) *Harris v. Packer*, 3 Tyrwh. 370.

(b) *Shute v. Robins*, 1 M. & M.

(z) See *Smith v. Bellamy*, 2 Stark. 133.

tive regulation, general usage, or particular course of trade, the rule is, that they must be forwarded to their destination for acceptance within a reasonable time: what is that reasonable time, is a mixed question of law and fact, to be decided by a jury acting under the direction of a judge on the particular circumstances of each case, and who, in order to arrive at its determination, should not take into their consideration the situation and interests of the drawer only, or of the holder only, but of both; and where they have been directed to act thus, and have held a delay of four months and twenty-one days not unreasonable, their decision has been approved of, (c) though the bill was not circulated during that time. But if there be a wanton or careless detainer by the holder even of such a bill, the other parties are discharged. (d) On a presentment for acceptance, the bill must, it seems, be left with the drawer twenty-four hours, unless he in the interim either accept or refuse to do so. (e)

Though a *presentment for payment* be not made on the very day when the bill or note becomes due, the maker or acceptor will not be discharged; (f) though if it were payable at a particular place, where money had been lodged to meet the expected demand and lost in consequence of the holder's delay, the rule might possibly be different; (g) nor if it be presented at a particular banker's, and dishonoured, need notice of dishonour be given to the maker or acceptor, for the bankers are his agents, and dishonour by them is dishonour

(c) *Mellish v. Rawdon*, 9 Bingh. 421.
Muilman v. D'Eguino, 2 H. Bl. 565.

(d) *Muilman v. D'Eguino*. *Mellish v. Rawdon*.

(e) Bayley, 5th ed. p. 231. But not on a presentment for payment; if it be, the presentment is not complete till the money is called for. *Hayward v. Bank of England*, Str. 550. If, while the bill remains with the drawee for acceptance,

it be lost through his carelessness, he will be responsible: but it will be otherwise if the holder or his agent have carelessly allowed a third person to learn the private marks on the bill, and obtain it from the drawee by describing them. *Morrison v. Buchanan*, 6 C. & P. 22.

(f) *Rhodes v. Gent*, 5 B. & A. 244.

(g) *Rhodes v. Gent*, ante.

by him. (*h*) But the drawer and all the indorsers will be discharged if a presentment be not made upon the very day, or if proper notice of dishonour be not given. A bill or note payable on demand becomes due at the moment of presentment. But this presentment must be made within a reasonable time after receiving it. (*i*) What is a reasonable time, is in the absence of any settled rule, a mixed question of law and fact, to be decided in the same way as the like question concerning the presentment for acceptance (*k*) of bills payable at or after sight; and a longer time for presentment will be allowed where the instrument has been circulated, and was apparently meant for circulation; (*l*) but any delay beyond what the common course of business warrants, is in ordinary cases *unreasonable*. The course of business formerly was understood to be, to allow the party to keep it, if payable in the place where it was given, till the morning of the next business day after its receipt, if payable elsewhere, till the next post. (*m*) Various contradictory decisions afterwards took place upon the subject, and the established rule now is, that if the instrument be payable at a banker's, and in the place where a party receives it, it suffices to present it for payment *at any time during banking hours* on the day after it is received. (*n*) If it be payable elsewhere, it suffices to

(*h*) *Smith v. Thatcher*, 4 B. & A. 200. *Treacher v. Hinton*, 4 B. & A. 413. *Pearse v. Pemberthy*, 3 Camp. 261.

(*i*) *Ward v. Evans*, Lord Raym. 928. *Moor v. Warren*, Str. 415. *Fletcher v. Sandys*, Str. 1248. *Turner v. Mead*, Ib. 416.

(*k*) See ante, *Shute v. Robins*. *Muilman v. D'Eguino*. *Mellish v. Rawdon*.

(*l*) See *Barrough v. White*, 4 B. & C. 325. 2 C. & P. 8. *Heywood v. Watson*, 4 Bingh. 560. *Gascoyne v. Smith*, M'Clell. & Y. 338. *Banks v. Colwell*, 3 T. R. 81. *Camidge v. Al-*

lenby, 6 B. & C. 373. *Rogers v. Langford*, 1 Cr. & Mee. 637.

(*m*) *Ward v. Evans*, Lord Raym. 928. *Moor v. Warren*, Str. 415. *Fletcher v. Sandys*, Str. 1248. *Turner v. Mead*, Str. 416. *Hoar v. Da Costa*, Str. 910. *Manwaring v. Harrison*, Str. 508. *E. I. Company v. Chitty*, Str. 1175.

(*n*) *Robson v. Bennett*, 2 Taunt. 388. *Pocklington v. Silvester*, Chitty on Bills, 8th ed. 419. See *Gillard v. Wise*, 5 B. & C. 134. *Camidge v. Allenby*, 6 B. & C. 380. *Boddington v. Schlenker*, 1 Nev. & Mann. 540.

forward it by the regular post on the day after it is received; (o) and the party receiving it by post, has till the next day to present it. (p) These limits, however, must not be transgressed, (q) save under very particular circumstances, as where a servant received the notes on Friday for his master, who was then absent, and did not return till after banking hours on Saturday, and consequently could not present the notes till Monday. (r)

A bill or note importing in its terms to be payable within a limited time after a certain event, *ex. gr.* after sight, or at a particular day or at sight, is not really payable till three days afterwards, (s) unless the third be a day of public rest, such as Sunday, Good-Friday, Christmas-day, or some day appointed by proclamation for a solemn fast or day of thanksgiving, in which case it is payable upon the second day. (t) The surplus days are called *days of grace*, and their number differs in different countries. (u) In France, Genoa, Leghorn, Palermo, Amsterdam, Antwerp, and Rotterdam, there are none. In England as has been said, they are three; and as in computing the time a bill has to run, the day of its date must always be excluded, so must the day on which it purports to fall due, in computing the commencement of the days of grace, (w) upon the last of which it must be presented. Thus if a bill be dated 2d November, 1832, and payable at two months after date, January 3, 1833, will be the first day

(o) Rickford *v.* Ridge, 2 Camp. 537. B. N. P. 274. D'Anson *v.* Thomas, Darbishire *v.* Parker, 6 East, 3. Bayley, 5th ed. 98. Dehers *v.* Harriot,

(p) Williams *v.* Smith, 2 B. & A. 1 Show. 163. Kyd. p. 10.
496.

(q) Beeching *v.* Gower. Holt, N. P. 39 & 40 G. 3. cap. 42. 7 & 8 G. 4. C. 315. Camidge *v.* Allenby, 6 B. & cap. 15. ss. 1 & 2.
C. 373.

(r) James *v.* Holditch, 8 D. & Ry. Goldsmith *v.* Shee; and Idem *v.* Bland, 40. See Williams *v.* Smith, 2 B. & A. Bayley, 5th ed. 246. See Chitty on Bills, 8th ed. 407.
496.

(s) Coleman *v.* Sayer, 1 Barnard. (w) Except at Hamburgh, where it is
303. Brown *v.* Harradan, 4 T. R. 148. the first of the days of grace.

of grace, and on January 5, 1833, the bill must be presented.

When a bill is drawn at a place using one style, and payable at a place using another, the rule as stated in Bayley on Bills, is that "if the time be to be reckoned from the date, it shall be computed according to the style of the place at which it was drawn, otherwise according to the style of the place where it is payable; and in the former case, the date must be reduced or carried forward to the style of the place where the bill is payable, and the time reckoned from thence."

When a bill is to be paid so many days after the happening of a particular event, as after sight, the day on which that event happens is excluded. (x) Thus a bill payable six days after sight, if seen upon the 1st of January, would import to be payable upon the 7th, and would be payable in reality upon the 10th, allowing for the days of grace.

A foreign bill is frequently drawn payable at so many *usances*, as in the form above given. An *usance* signifies the time in which during the infancy of bills, all bills between this country and the place on or at which the instrument is drawn, were payable; (y) these usances are calculated exclusively of the day of the date and of the days of grace. Thus, an usance between this country and Venice being three calendar months, a bill drawn on Venice at two usances, and dated on the 1st of January, purports to fall due upon the 1st of July following. But at Venice six days of grace are allowed, excluding Sundays, holidays, and days on which the bank is shut; the bill therefore must not be presented till the 7th, and if such a day intervene, not till the 8th.

In computing the time which such bills have to run, it sometimes becomes necessary to divide a month; thus, a bill drawn on Venice at half usance, is payable at one month and

(x) Bayley on Bills, 5th ed. 250.
Coleman v. Sayer, 1 Barnard. 303.

(y) See a table of Usances. Chitty
on Bills, 8th ed. 405.

a half from date; in such cases the half month means *fifteen days*. (z)

We have now seen on what day a bill or note should be presented, and must farther observe, that such presentment must take place at a *seasonable time* on that day. Where by the known custom of a particular place or business, the presentment ought to be made within certain hours, a presentment out of those hours, *ex. gr.* to a banker after banking hours is *unseasonable*. (a) But in other cases, eight in the evening is not an unseasonable hour. (b)

SECTION VI.—Notice.

When a bill or note is refused acceptance or payment, notice of such refusal must immediately be given to any party to whom the holder wishes to have recourse; (c) if he have died, to his representatives; if he have become a bankrupt, and assignees are chosen, to those assignees. (d) Although a bill may not require acceptance, yet if it be presented for acceptance and refused, and notice be not given, it becomes unavailable, (e) save in the hands of a subsequent indorsee for value, who was not aware of the dishonour. (f)

The notice must come from the holder, or some person entitled to call for payment or reimbursement. (g) Notice from the acceptor has been held sufficient; (h) however, as a learned author remarks, he probably acted in that case as agent for

(z) Marius, 23.

(a) Parker v. Gordon, 7 East. 385.
Elford v. Teed, 1 M. & S. 28.

(b) Barclay v. Benley, 2 Camp. 527.
Wilkins v. Jadis, 2 B. & Ad. 188.
Morgan v. Davidson, 1 Stark. 114.

(c) Lafitte v. Slatte, 6 Bingh. 623.

(d) Rhode v. Proctor, 4 B & C. 517.
See Exp. Moline, 19 Ves. 216.

(e) Blesard v. Hirst, Burr. 2670.—

Goodall v. Dolley, 1 T. R. 712.

(f) O'Keefe v. Dunn, 6 Taunt. 305. Dunn v. O'Keefe, 5 M. & S. 202.

(g) Exp. Barclay, 7 Ves. 597. Jameson v. Swinton, 2 Taunt. 224. Wilson v. Swabey, post. See Stewart v. Kennett, 2 Camp. 177.

(h) Rosher v. Kieran, 4 Camp. 87.

the holder. (i) But a notice given by the holder, or any other party, enures to the benefit of all who stand between that party and the person receiving it; (k) and a notice given by one party to another, and communicated without laches by that other to prior parties, renders them liable to him who gave the first notice. (l)

Though there is no peculiar form of notice, yet it must import that the bill or note has been dishonoured, and that the party receiving the notice is considered liable, and expected to discharge it. (m)

A foreign bill dishonoured, should be protested, and a copy of the *protest* sent with the notice, (n) unless indeed in the case of a person, who having drawn or indorsed a bill abroad, comes to this country and receives the notice here. (o) With respect to inland bills, they require no protest, but are usually *noted* for non-payment, a ceremony which is however quite unnecessary. (p)

A protest is a minute of the nonacceptance, accompanied by a solemn declaration on the part of the holder against any loss to be sustained thereby: (q) it is made out by a notary public, who, at a seasonable hour, in the course of the same day in which the bill has been dishonoured, again presents or causes it (r) to be presented, and if payment be again refused, makes a minute, consisting of his initials, the day, month, and year, and reason, if assigned, of non-payment; this minute, the making of which is termed *noting* the bill, is a mere memo-

(i) Bayley on Bills, 5th ed. 254.

(k) Wilson v. Swabey, 1 Stark. 34.

(l) Wilson v. Swabey. Jameson v. Swinton, 2 Camp. 373.

(m) Tindal v. Brown, 1 T. R. 167. 186. Hartley v. Case, 4 B. & C. 339. Solarte v. Palmer, 7 Bingh. 533.

(n) Rogers v. Stephens, 2 T. R. 713. Gale v. Walsh, 5 T. R. 239. Brough v. Parkins, Ld. Ray. 993.

(o) Cromwell v. Hynson, 2 Esp. 511.

Robins v. Gibson, 3 Camp. 334. 1 M. & S. 288. B. N. P. 271.

(p) See the subject discussed. Chitty on Bills, 8th ed. pp. 500, 501.

(q) See the form, Chitty on Bills, 8th ed. p. 497.

(r) The question whether the notary must not present in person seems as yet undecided. See Leftly v. Mills, 4 T. R. 175, and Chitty on Bills, 8th ed. 493.

randum, from which the notary may afterwards draw up a *protest* at his leisure, (s) but *per se*, it is of no legal effect. (t) The protest must in this country be stamped, according to stat. 55 G. 3. cap. 184.

In ordinary cases the bill is protested for non-acceptance or non-payment, in the place where acceptance or payment was refused, (u) By stat. 2 & 3 W. 4. cap. 98. it is enacted that a bill made payable by the drawer at any other place than the place therein mentioned by him to be the residence of the drawee, and which shall not be accepted on presentment, shall or may be, without further presentment, protested for non-payment in the place where it has been made payable, unless the amount shall have been paid to the holder on the day when it would have become payable if duly accepted.

As to the *time* at which the *notice* must be given, notice upon the very day on which a bill was presented for payment and dishonoured, has been held not too soon, (w) but it will be too late if not given by the holder to parties who reside in the place where the presentment was made by the expiration of the day following the refusal, to other parties, by the post of that or the next post day; (x) each party, however, has a day for giving notice. Thus if A. draw a bill in favour of B., who indorses it to C., and the bill is refused payment on Monday, C. has all Tuesday to give notice either to A. or B., and if he give notice to B. on that day, B. has all Wednesday to give notice to A. And Sundays, days of public rest, and days to which a man's peculiar creed gives the same sanctity as that

(s) See *Chaters v. Bell*, 4 Esp. 48.

(t) *Leftly v. Mills*, 4 T. R. 175. *Rogers v. Stephens*, 2 T. R. 713. *Gale v. Walsh*, 5 T. R. 239. B. N. P. 271. *Orr v. Magennis*, 7 East. 359.

(u) See *Mitchell v. Baring*, 10 B. & C. 4.

(w) *Burbridge v. Manners*, 3 Camp. 193. *Exp. Moline*, 19 Ves. 216. *Hine v. Allely*, 4 B. & Adol. 624.

(x) *Bayley*, 8th ed. 268. *Bray v. Hadwen*, 5 M. & S. 68. *Wright v. Shawcross*, 2 B. & A. 501. *Jameson v. Swinton*, 2 Taunt. 224. *Gull v. Jeremy*, 1 M. & M. 61. Where the notice is to be sent by post he is entitled to the *whole* of the day after he receives the notice, though a post go out during that day. *Hawkes v. Salter*, 4 Bingh. 715.

of Sunday, are excluded from the computation altogether. (y) A banker presenting a bill or note for his customer, has the same time to give notice to his customer as if he, the banker, were the holder for his own benefit; and the customer has the same time as if such had been the case to transmit the notice to former parties. (z) It sometimes happens that the person holding the bill or note at the time of dishonour is ignorant of the residence of previous parties thereto; in such a case it has been decided that if he received it from his traveller, he may give notice to that traveller, notice from whom to those parties will be sufficient. (a) If he is forced to employ an attorney to find out their residences, the attorney has a day after he has obtained the necessary information to apprise his client thereof, and receive his directions; (b) and in general when it is not known where a party resides, *due diligence* to find him out will be sufficient. (c) A party's time for giving notice will not be enlarged by the circumstance of his having received his own sooner than he had a right to it, or of his having given it within the time in which it might have been transmitted from himself to the defendant, through all the intervening parties. (d)

The notice need not be in writing; (e) it may be sent to the party's counting-house. (f) If dispatched by the post, that is sufficient, though it be not received: (g) nay, where the drawer

(y) *Hawkes v. Salter*, 4 Bingham 715. *Smith v. Mullet*, 2 Camp. 208. *Haynes v. Birks*, 3 B. & P. 599. *Scott v. Lifford*, 9 East. 347. *Lindo v. Unsworth*, 2 Camp. 602. *Tassell v. Lewis*, Lord Ray. 743. 39 & 40 G. 3. cap. 42. and 7 & 8 G. 4. cap. 15.

(z) *Haynes v. Birks*, 3 B. & P. 599. *Scott v. Lifford*, 9 East. 347. *Langdale v. Trimmer*, 15 East. 291.

(a) *Baldwin v. Richardson*, 1 B. & C. 245.

(b) *Firth v. Thrush*, 8 B. & C. 387.

(c) *Bateman v. Joseph*, 12 East, R. 433. *Beveridge v. Burges*, 3 Camp. 262. *Browning v. Kinnier*, Gow, 81. *Firth v. Thrush*, ante.

(d) *Turner v. Leech*, 4 B. & A. 454.

(e) *Goldsmith v. Bland*, Bayley, 5th ed. 276.

(f) *Cross v. Smith*, 1 M. & M. 545. *Bancroft v. Hall*, Holt, 476.

(g) *Saunderson v. Judge*, 2 H. B. 509.

dated a bill generally, "Manchester," a letter addressed "Manchester" was held sufficient. (*h*) But *primâ facie*, such a direction is too general. (*i*) If there be no post, it is enough to use the ordinary method of conveyance, for instance, in the case of a foreign bill, the first *regular* ship. (*k*) But though it is in all cases sufficient to send notice by the *ordinary* conveyance, it is not absolutely necessary to do so; the employment of a private agent will suffice, provided that he actually give the notice, or take due steps for that purpose. (*l*) In some cases, under very peculiar circumstances, notice is excused; (*m*) thus, though the drawer or indorser, if he partly liquidate, or promise to liquidate, a bill, in ignorance that he has been discharged by want of proper notice, is not precluded from insisting upon such discharge when he discovers it; (*n*) yet if he had full knowledge of the circumstance, he will be precluded. (*o*) It has also been held that if a bill has been accepted for the accommodation of the drawer, who had not the least reason to expect that it would be paid, he will not be entitled to notice of its dishonour, (*p*) since the reason for notice is, that the drawer may, without delay, withdraw his effects

(*h*) Mann v. Moss, 1 R. & M. 249.

(*i*) Walter v. Haynes, 1 R. & M. 149.

(*k*) Muilman v. D'Eguino, 2 H. Bl. 565.

(*l*) Bancroft v. Hall, Holt. 476.

(*m*) Whether facts that excuse notice can be proved under a declaration, averring notice, seems a moot point. See Corey v. Scott, 3 B & A. 619. cited as to this question in Bayley on Bills, 5th ed. 406. The form in Reg. G. Trin. T. 1831, avers "*due notice*," and in such a case, is not the bringing the action "*due notice*," as it is in many cases, a sufficient "*request*?" See Firth v. Thrush, 8 B. & C. 387.

(*n*) Blesard v. Hirst, Burr. 2670.—

Goodall v. Dolley, 1 T. R. 712. Pickin Graham, 1 Cr. & Mee, 728.

(*o*) Vaughan v. Fuller, Str. 1246. Horford v. Wilson, 1 Taunt. 12. Lundie v. Robertson, 7 East. 231. Gibbon v. Coggon, 2 Camp. 188. Greenway v. Hindley, 4 Camp. 52. Hodge v. Fillis, 3 Camp. 463. Wood v. Brown, 1 Stark. 217. Potter v. Rayworth, 13 East. 417. Rogers v. Stephens, 2 T. R. 713. Wilks v. Jacks, Peake, 202. B. N. P. 276.

(*p*) Sharp v. Benley, 9 B & C. 44. Rogers v. Stephens, 2 T. R. 713. Bickerdike v. Bollman, 1 T. R. 405. Goodall v. Dolley, 1 T. R. 712. per Buller, J. Legge v. Thorpe, 12 East. 171. Claridge v. Dalton, 4 M. & S. 226.

from the drawee's hands, which reason of course cannot apply when he has none there. But it is dangerous to rely on this excuse, for the drawer is entitled to notice, if, on taking up the bill, he could sue the acceptor, or any other party, (*q*) or if he had effects on their way to the drawee, (*r*) or had effects in the drawee's hands at the time when the bill was drawn, (*s*) or when it was presented for acceptance, (*t*) or afterwards, but before it became due, (*u*) though the effects were less than the amount of the bill, and the drawer was indebted to the acceptor in a larger amount than their value : (*w*) in a word, if he have any reasonable ground to expect that the bill will be paid, he is entitled to notice. (*x*) Neither will the destruction of the bill, coupled with the drawer's refusal to give a new one, according to stat. 9 & 10 W. 3. c. 7. (*y*) the insolvency of the acceptor, (*z*) or the fact of his having told the drawer that he would not pay the bill, and having given him part of the amount to assist him in doing so, (*a*) or indeed any circumstances other than those hereinbefore stated, be sufficient to excuse the want of notice. (*b*) It was once held that where A., knowing the maker's insolvency, became payee of a note for his accommodation, he could not complain of the want of due presentment and notice. (*c*) But inasmuch as A., in such case, could, upon payment of the note, have sued the maker,

(*q*) *Exp. Heath*, 2 Ves. & B. 240. 2
Rose, 141. *Corey v. Scott*, 3 B. & A.
 619. *Norton v. Pickering*, 8 B. & C.
 610.

(*r*) *Rucker v. Hiller*, 3 Camp. 217.
 16 East. 43.

(*s*) *Orr v. Magennis*, 7 East. 359.

(*t*) *Blackhan v. Doren*, 2 Camp. 503.

(*u*) *Hammond v. Dufresne*, 3 Camp.
 145. *Thackray v. Blackett*, 3 Camp.
 164.

(*w*) *Thackray v. Blackett*, *ubi supra*.
Blackhan v. Doren, 2 Camp. 403.

(*x*) *Lafitte v. Slatter*, 6 Bingh. 626.

(*y*) *Thackray v. Blackett*, *ubi supra*.

(*z*) *Ibid.* *Dennis v. Morrice*, 3 Exp.
 158.

(*a*) *Baker v. Birch*, 3 Camp. 107.—
See Pickin v. Graham, 1 Cr. & Mee.
 728.

(*b*) *See Clegg v. Cotton*, 3 B. & P.
 239. *Staples v. Okines*, 1 Esp. 332.
Prideaux v. Collier, 2 Stark. 57. *Leach*
v. Hewit, 4 Taunt. 731. *Free v. Haw-*
kins, 8 Taunt. 92. *Pickin v. Graham*,
 1 Cr. & Mee. 728.

(*c*) *De Berdt v. Atkinson*, 2 H. Bl.
 336.

he was, according to the rule above laid down, clearly entitled to notice. That case, therefore, seems not to be law, and has in fact been virtually overruled by subsequent decisions ;(d) if indeed A. had taken effects from the maker to answer the note, the case would be different, for then he could not expect the maker to take it up, and would have no action against any one on payment of it. (e)

It has been held that where two indorsers were discharged by the holder's neglecting to give them notice of a refusal to accept, and one of them, in ignorance of his discharge, paid the bill when it became due, he could not recover its amount against the other, whose liability could not be revived by the plaintiff's ignorance of his own discharge. (f)

SECTION VII.—*Payment.*

THE payment must of course be to the holder or his representative. (g) There are some rules of which it is proper to take notice, respecting payment of a forged note or bill. If the drawer's signature be forged, the drawee, *if he accepts the bill*, is bound to pay it, provided it be in the hands of a holder *bonâ fide*, and for value, (h) for the drawee's acceptance admits the drawer's handwriting to be genuine. If he have not accepted, yet if he pay it, he cannot recover his money back from such a holder ; at all events, not unless he discover the forgery, and give notice of it that very day. (i) And the

(d) *Nicholson v. Gouthit*, 2 H. Bl. 609. *Smith v. Beckett*, 13 East. 187. *Brown v. Maffrey*, 15 East. 216.

(e) *Corney v. Da Costa*, 1 Esp. 302.

(f) *Roscoe v. Hardy*, 12 East. 434.

(g) It seems that if the drawer of a cheque write across it the name of the banker of the party to whom he pays it, it will be at the drawee's peril, if he pay

any one except that banker. *Stewart v. Lee*, 1 M. & M. 158. *Boddington v. Schlenker*, 1 Nev. & Mann, 540.

(h) *Smith v. Chester*, 1 T. R. 655. per Buller, J.

(i) *Price v. Neale*, Burr. 1354. Bl. 390. *Smith v. Mercer*, 6 Taunt. 76.—*Cocks v. Masterman*, 9 B. & C. 902.—See *Wilkinson v. Johnson*, 3 B. & C. 428.

same diligence is incumbent on one who pays for the honour of a person whose signature has been forged. *(k)* Nor will he who pays a forgery have any remedy against the person whose signature has been forged, unless that person have by his gross negligence, facilitated the commission of the forgery; in which case he will have to bear the loss thereby occasioned. Thus where Hall drew upon his banker for three pounds, and the bearer of the cheque altered the 3 into 200, the banker having paid it in that state, was forced to bear the loss. *(l)* But where a cheque for £50. 2s. 3d. was drawn so carelessly that the agent who presented it, and who had previously filled it up, was enabled to introduce a figure of 3 before the figures 50, and the words "*Three hundred and*" before the word "*Fifty*," it was held that the drawer, not the banker, who paid it in its altered state, should be the sufferer. *(m)* Where any of the signatures through which the holder claims are by procuration, the party paying must ascertain the sufficiency of the procuration at his peril. *(n)* He must also take care that there be no restrictive indorsement, *(o)* and it is dangerous to pay before the instrument is due. *(p)*

Payment supra Protest.—After a foreign bill has been protested, any person may pay it for the honour of the drawer or indorser, and will have his remedy against the party for whose honour he paid, and all others who are liable to him. *(q)* But before he so pay, he must take care that the bill is protested. *(r)*

How enforced.—Payment of a bill or note may be enforced

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| <i>(k)</i> Wilkinson v. Johnson. | <i>(p)</i> Da Silva v. Fuller, Chitty, 148. |
| <i>(l)</i> Hall v. Fuller, 5 B. & C. 750. | Bayley, 5th ed. 326. Marius, 31. |
| <i>(m)</i> Young v. Grote, 4 Bingham. 253. | <i>(q)</i> Beawes, pl. 50. Bayley, 5th ed. |
| <i>(n)</i> E. I. C. v. Tritton, 3 B. & C. 280. | 325. See Mertens v. Winnington, 1 |
| <i>(o)</i> Sigourney v. Lloyd, 8 B. & C. | Esp. 112. Exp. Lambert, 13 Ves. 179. |
| 622. 5 Bingham. 525. Ancher v. Bank of | <i>(r)</i> Vandewall v. Tyrrell, 1 M. & M. |
| England, Dougl. 615. 637. See Stew- | 87. |
| art v. Lee, 1 M. & M. 158. | |

by action (s) against the drawee, if he have accepted; against the drawer and indorsers, if the bill have been dishonoured either by non-acceptance or non-payment: all these parties may be sued either at the same time or successively: but if they be sued at the same time, the Court will stay proceedings at the application of the maker or acceptor, on payment of the bill and of the costs in all the actions, and at the application of any other party, on payment of the bill and of the costs in the action against himself.(t) A drawer, indorser, acceptor for honour, or the bail of such a party, or any one who has discharged the bill on his account, becomes on payment a holder. He does not, however, hold as on a transfer from the person to whom he has made the payment; but if a party to the bill, as in his original capacity,(u) if not, as on a transfer from the person in whose behalf he made the payment,(w) in whose precise situation he stands; so that when that party could not sue on the instrument, he cannot.(x)

What recoverable.—The holder is generally entitled to recover the money expressed to be payable in the instrument, with interest, (which, unless it be reserved, the jury are not, however, absolutely bound to give,)(y) and all incidental expences occasioned by non-acceptance or non-payment. If interest be expressly reserved, it is computed from the date,(z)

(s) The remedy is facilitated by stat. 3 & 4 W. 4. c. 42. s. 12. which allows the plaintiff in his affidavit to hold to bail, process and declaration, to describe parties by the initial letter, or a contraction of their Christian names, if they are so designated in the bill or note.

(t) *Smith v. Woodcock*, 4 T. R. 691.

(u) *Louviere v. Laubrey*, 10 Mod. 36. *Symonds v. Parmenter*, 1 Wils. 185. 4 Bro. P. C. 604.

(w) *Mertens v. Winnington*, 1 Esp.

112. *Hall v. Pitfield*, Bayley, 5th ed. 329.

(x) *Bishop v. Hayward*, 4 T. R. 470. *Exp. Lambert*, 13 Vesey 179.

(y) *Du Belloix v. Lord Waterpark*, 1 D. & R. 16. See *Brooke v. Coleman*, 1 Cr. & Mee. 621. *Latraille v. Hoepfner*, 10 Bing. 334.

(z) *Kennerley v. Nash*, 1 Stark. 452. *Hopper v. Richmond*, 1 Stark. 507. *Denman v. Dibdin*, 1 R. & M. 380.

if not, from the time at which the bill or note is payable, (a) provided it was then duly presented, as, if it be payable on demand, from the time of demand. It is generally computed up to the time when final judgment may be signed; (b) but if there have been a tender, to the time of tender only. (c) It is clear that notwithstanding stat. 3 & 4 Ann. c. 9. s. 5., interest may be recovered against drawers and indorsers of inland bills, though not protested; (d) the object of that act being to give new rights, not destroy old ones. But the expences of noting and postage incurred on the return of an inland bill, are not recoverable unless specially laid as damage in the declaration, and proved accordingly. (e) On a foreign bill *re-exchange* is also recoverable; and though the bill be returned through ever so many hands, the drawer will be liable for the re-exchange on each return. (f) It has been said that the acceptor is not liable for re-exchange; (g) but this is doubtful.

SECTION VIII.—*Resistance against Payment.*

If the person sued upon a bill or note think proper to defend himself, he either denies that he was ever liable, or admitting his liability to have existed, contends that it has been determined.

First.—If he deny that he was ever liable, he may rely upon the absence of any of those circumstances which are above shewn to be essential to the holder's right to recover,

(a) *Blaney v. Bradley*, Black. 761.
Bayley, 5th ed. 348. *Phillips v. Franklin*, Gow, 196.

(b) *Robinson v. Blande*, Barr. 1077.

(c) *Dent v. Dunn*, 3 Camp. 296.

(d) *Windle v. Andrews*, 2 B. & A. 696.

(e) *Kendrick v. Lomax*, 2 Tyrwh. R. 447.

(f) *Mellish v. Simeon*, 2 H. Bl. 378. *De Tastet v. Baring*, 11 East, 265.

(g) *Napier v. Schneider*, 12 East, 420. But see *Bayley*, 5th ed. 353. *Francis v. Rucker*, Ambl. 672.

the presence of which he has not by his own act admitted; (*h*) or on the *insufficiency* or *illegality* of the consideration for his liability.

Insufficiency of consideration.—Contrary to the general rule which prevails respecting other simple contracts, a bill or note is always *primâ facie* presumed to have been given for a sufficient consideration; this presumption is, however, open to rebuttal, and the defendant may shew that he has received no consideration, or no sufficient consideration for his liability. (*i*) The former of which circumstances may be a defence *in toto*, the latter *pro tanto*, provided the deficiency of consideration can be estimated, for otherwise the remedy is by cross action. (*k*) He may also protect himself on the ground that his signature was obtained by duress, (*l*) or fraud, (*m*) or that the bill or note has been lost or stolen. (*n*)

These defences may be rebutted by the holder's shewing that either he himself or some intermediate party, took the bill or note *bonâ fide*, and paid a valuable consideration for it; (*o*) and where that is the case it will be no defence that the bill was originally accommodation-paper, and known by the

(*h*) Vide ante.

(*i*) Jeffries *v.* Austen, Str. 647. Jackson *v.* Warwick, 7 T. R. 121. Barber *v.* Backhouse, Peake 61. Darnell *v.* Williams, 2 Stark. 166. Holliday *v.* Atkinson, 5 B. & C. 501. Jones *v.* Hibbert, 2 Star. 304. Sparrow *v.* Chisman, 9 B. & C. 241. Thomas *v.* Newton, 2 C. & P. 606.

(*k*) Morgan *v.* Richardson, 1 Camp. 40, in notis. Fleming *v.* Simpson, *ibid.* Solomon *v.* Turner, 1 Stark. 51. Tye *v.* Gwynne, 2 Camp. 346. Moggeridge *v.* Jones, 14 East, 486. Spiller *v.* Westlake, 2 B. & Ad. 155.

(*l*) Duncan *v.* Scott, 1 Camp. 100.

(*m*) Heath *v.* Sansom, 2 B. & Ad.

291. Rees *v.* M. of Headfort, 2 Camp. 574. Ledger *v.* Ewer, Peake, 216.

(*n*) Grant *v.* Vaughan, Burr. 1516. Peacock *v.* Rhodes, Dougl. 611. 633. Gill *v.* Cubitt, 3 B. & C. 466. See cases collected, ante, sect. 3. p. 130.

(*o*) Rothschild *v.* Corney, 9 B. & C. 388. Down *v.* Halling, 4 B. & C. 330. Morris *v.* Lee, Bayley, 500. B. N. P. 274. De Bras *v.* Forbes, 1 Esp. 117. Bosanquet *v.* Dudman, 1 Stark. 1. See Exp. Bloxam, 8 Ves. 53. Heywood *v.* Watson, 4 Bingh. 496. If on recovering the amount, he would hold part only of the money beneficially, and the rest as a trustee, he nevertheless may recover all. Reid *v.* Furnival, 1 Cr. & Mee. 539.

holder so to be. (*p*) It has been laid down that wherever a note or acceptance was given under such circumstances that the original payee could not have recovered on it; the indorsee suing on it, may at the trial be called upon to shew how it came to his hands, and is not entitled to a previous notice. (*q*)

Illegality.—Another ground of defence is the illegality of the consideration : (*r*) as that the bill or note was given for signing a bankrupt's certificate ; (*s*) for joining in the acceptance of a composition ; (*t*) for prostitution ; (*u*) to secure the present payment of a sum certain for the future expenses of a bastard child ; (*w*) for stock-jobbing differences ; (*x*) for dropping a criminal prosecution ; (*y*) for ransom or money lent to enable the proprietor to obtain the ransom of a British vessel, or goods, except in certain cases ; (*z*) for recommendation to

(*p*) *Smith v. Knox*, 3 Esp. 46. *Charles v. Marsden*, 1 Taunt. 224. But quære if the latter case be well decided.

(*q*) In *Heath v. Sansom*, 2 B. & Ad. 291. by three judges, Parke J., *dissent*. *Paterson v. Hardacre*, 4 Taunt. 114. *Wyatt v. Campbell*, 1 M. & M. 80. *Mann v. Lent*, 10 B. & C. 877.

(*r*) *Knight v. Hunt*, 5 Bingham. 432. *Britten v. Hughes*, 5 Bingham. 460. *Blogg v. Pinkers*, 1 R. & M. 125. *Haywood v. Chambers*, 5 B. & A. 753. *Bryant v. Christie*, 1 Stark. 329. *Leicester v. Rose*, 4 East, 372. See *Young v. Timmins*, 1 Tyrwh. 237.

(*s*) Stat. 6 G. 4. c. 16. s. 125.

(*t*) Vide cases above, note (*r*). But a security for the early payment of his composition to a creditor who *has* accepted one, is not illegal. *Feise v. Randal*, 6 T. R. 146. Neither is past seduction an illegal consideration. *Annan-dale v. Harris*, 2 P. Wms. 232. *Cray v.*

Rooke, Forrest. 153. *Turner v. Vaughan*, 2 Wils. 339. Nor a curtailment of the usual term of imprisonment by the Court, in favour of a defendant who has agreed to pay a sum of money to the prosecutor. *Beeley v. Wingfield*, 11 East. 46. *Kirk v. Strickwood*, 4 B. & Ad. 423. ; nor, where there have been both civil and criminal proceedings, a compromise of the latter. *Harding v. Cooper*, 1 Stark. 467., nor the liquidation of excise penalties with the consent of the commissioners. *Pilkington v. Green*, 2 B. & P. 51. *Sugars v. Brinkworth*, 4 Camp. 46.

(*u*) *Walker v. Parkins*, Burr. 1568.

(*w*) *Cole v. Gower*, 6 East, 110.

(*x*) *Armory v. Merryweafher*, 2 B. & C. 573. See *Day v. Stuart*, 6 Bingham. 109.

(*y*) *Collins v. Blantern*, 2 Wils. 349.

(*z*) 45 G. 3. c. 72. See *Webb v. Brooke*, 3 Taunt. 6.

an office in the King's household, (a) in pursuance of a smuggling, usurious, or stock-jobbing contract; (b) for money lost by gaming, (except in a royal palace, in which the King is actually residing, the freehold and inheritance of which is in the Crown, and which is not in lease;) or betting on the sides of persons so gaming; money knowingly lent for such gaming or betting, or lent at the time and place of such play, to any person then gaming or betting, or who shall during the play, play or bet; (c) for the amount of a wager, upon any branch of the public revenue; (d) or for spirituous liquors sold in small quantities contrary to stat. 24 Geo. 2. c. 40. s. 12. (e)

Where the consideration of a bill or note is partly illegal, the security, being entire, becomes void *in toto*, (f) though the plaintiff may still, without using the bill or note, recover that part of the consideration which is good. (g) If a bill or note given for an illegal consideration be renewed, the new instrument is also void, (h) though not if it be so reformed as to exclude that part of the consideration which was objectionable. (i)

In some cases of illegality the bill is void even in the hands of a holder *bonâ fide*, and for value: these are where the

(a) Harrington v. Duchatel, Bro. Cha. C. 114.

(b) See Day v. Stuart, 6 Bingh. 109. Guichard v. Roberts, Bl. 445. Banks v. Colwell, cited 3 T. R. 81. 12 Ann. stat. 2. c. 16; stat. 7 G. 2. c. 8. Faikney v. Reynons, Burr. 2069. Petrie v. Hannay, 3 T. R. 418. Steers v. Lashley, 6 T. R. 61. Brown v. Turner, 7 T. R. 630.

(c) 9 Anne c. 14. See Lloyd v. Gurdon, 2 Swanst. 180. Jeffreys v. Walter, 1 Wils. 220. Lynall v. Longbotham, 2 Wils. 36. Shillito v. Theed, 7 Bingh. 403. A bill in equity lies to discover the consideration of a gaming security.

Andrews v. Berry, 3 Anst. 634.

(d) Shirley v. Sankey, 2 B & P. 130. Atherfold v. Beard, 2 T. R. 610.

(e) Scott v. Gillmore, 3 Taunt. 226.

(f) Scott v. Gillmore, 3 Taunt. 226. See Cruickshanks v. Rose, 1 M. & Rob. 100.

(g) Robinson v. Bland, Burr. 1077. Wood v. Benson, 2 Tyrwh. 93.

(h) Chapman v. Black, 2 B. & A. 588. Wynne v. Cullander, 1 Russ. 263. Preston v. Jackson, 2 Star. 237.

(i) See Preston v. Jackson, ubi sup. Hubner v. Richardson, Bayley, 5th ed. 516.

consideration is, either wholly or in part, for signing a bankrupt's certificate; (*k*) for money lost, or applied in any of the modes of gaming above enumerated; (*l*) for ransom, or money lent in order to ransom as aforesaid. (*m*) Money lent on an usurious contract was formerly within this class, (*n*) but by stat. 58 G. 3. cap. 93. no bill or note given on an usurious consideration is to be void in the hands of an indorsee for valuable consideration, if he were ignorant of the usury at the time he took the bill or gave the consideration. And by stat. 3 & 4 W. 4. cap. 98. sec. 7. bills or notes payable within three months after date, or not having more than three months to run, are exempted from the usury laws altogether. (*o*)

When the illegality is such as to make the instrument void in the hands even of a *bonâ fide* indorsee, yet if it were not originally *made* on that consideration, such illegality in the consideration on which it was afterwards transferred, is no defence against such indorsee, if he be not in making out his title bound to state or prove the signature of the person who made the illegal transfer; (*p*) the authorities are contradictory upon the question whether such illegality be a defence, when he is bound to state the signature and prove it. (*q*)

As to gaming securities, it is no objection to an action against the indorser that the bill or note was made on a gaming consideration; for though the statute says that they shall be void to all intents and purposes, that means only so far as is necessary to further the purposes of the act; and to exempt an

(*k*) Stat. 6 G. 4. c. 16. s. 125.

(*l*) Bowyer v. Bampton, Str. 1155.

(*m*) 45 G. 3. c. 72. ss. 16 & 17. See Webb v. Brooke, 3 Taunt. 6.

(*n*) 12 Anne, stat. 2. c. 16. Lowe v. Walter, Dougl. 708. 736.

(*o*) This section is worded in a very extraordinary manner: the intention of the legislature in framing it, was to alter

the law in the manner stated in the text. It remains however to be seen how the Courts will find it necessary to interpret it.

(*p*) Daniel v. Cartony, 1 Esp. 274.

(*q*) Parr v. Eliason, 1 East. 92. Daniel v. Cartony, ubi supra. Lowes v. Massaredo, 1 Stark. 285.

indorser from suit might assist a winner, whom the statute meant to punish, not to protect. (r)

Again, the defendant may admit his former liability, but contend that it has been determined by the *suspension, extinguishment, satisfaction, or discharge*, of the holder's right of action. We will say a few words concerning each of these grounds of defence.

1st, *Of Suspension*.—If the holder *renew* the bill or note, that is, if he take another bill or note from the defendant in continuation of it, his right of action on the first bill or note is *suspended* (s) till he has satisfied the defendant that he has no claim against him on the second, *ex. gr.*, by delivering it up. There may, *after a bill or note has been made*, be a binding *verbal* promise for valuable consideration to *renew* it when due; (t) but the defendant who relies on such a promise must show that he took proper steps to obtain the renewal; (u) and such a promise must not be *contemporaneous* with the drawing of the bill or note, or if it be made to an indorser, with his indorsement; if it be, the law will not enforce it; for to do so would be to incorporate with a written contract an incongruous *parol* condition, which is contrary to first principles. (w)

If at the time of making a note or bill, an indorsement be written on it, rendering it payable only on certain conditions,

(r) *Edwards v. Dick*, 4 B. & A. 212.

(s) *Kendrick v. Lomax*, 2 Tyrwh. 445. See *Exp. Barclay*, 7 Ves. 597. *Bishop v. Rowe*, 3 M. & S. 362. *Dillon v. Rimmer*, 1 Bingham 100.

(t) *Hoare v. Graham*, 3 Camp. 58. Per Lord Ellenborough. See *Gibbon v. Scott*, 2 Stark. 286.

(u) *Gibbon v. Scott*, *ubi supra*.

(w) *Hoare v. Graham*, 3 Camp. 58.

Free v. Hawkins, 8 Taunt. 92. *Woodbridge v. Spooner*, 3 B. & A. 233. *Ridout v. Bristow*, 1 Tyrwh. 84. *Rawson v. Walker*, 1 Stark. 361. *Mozeley v. Hanford*, 10 B. & C. 729. *Campbell v. Hodgson, Gow*, 74. On the same principle, proof cannot be received of a consideration different from that named in the instrument. *Ridout v. Bristow*, 1 Tyrwh. 84.

that will deprive it of the character of negotiability, and turn it into an agreement as between the parties privy to it. (*x*) It has been laid down that an acceptance might be rendered conditional by another contemporaneous writing, (*y*) though not as against a *bonâ fide* holder, ignorant of the existence of such a writing.

2dly, *Extinguishment*.—The defendant's liability on the bill or note will be *extinguished*, if the plaintiff obtain from him a security of a higher description, *ex. gr.*, a judgment upon it against him. (*z*) But such a judgment is not *per se* a satisfaction of the debt, nor will it, until satisfaction, prevent the holder from proceeding on the bill or note against any other distinct party to it. (*a*)

3dly, *Satisfaction*.—*Satisfaction* is by actual payment of the bill or note, or what is equivalent to payment, and this releases all the parties; for though the holder's claim may be extinguished as to some and not as to others, yet if satisfied as to any, it is satisfied as to all. (*b*) But the taking a man in execution,

(*x*) Leeds *v.* Lancashire, 2 Camp. 205. Hartley *v.* Wilkinson, 4 M. & S. 25.

(*y*) Bowerbank *v.* Monteiro, 8 Taunt. 846. Vide Spiller *v.* Westlake, 2 B. & Adol. 157. As to acceptances, see now stat. 1 & 2 G. 4. c. 78. s. 2. ante, Sect. 4. p. 133.

(*z*) Siddall *v.* Rawcliffe, 1 Cr. & Mee. 487. 3 Tyrwh. 441.

(*a*) Bac. Abr. Extinguishment D. Claxton *v.* Swift, 2 Shower, 441. 494. Lutw. 882. Hayling *v.* Mulhall, Bl. 1235. See Letchmere *v.* Fletcher, 1 Cr. & Mee. 629. 3 Tyrwh. 450. ubi, per Bayley B. "Suppose that on a *joint and several* note, you sue one and get judgment, you may sue the other." S. C. p.

634. "It may be, that where you sue and recover judgment against one debtor only upon a contract, which is joint and not several, that your right to sue on the joint contract is destroyed; that, if so, would be so merely on the ground of the difficulty to which the form of action would give rise, because the defendant would have a right to plead, that he made no contract, except with the other defendant, against whom the judgment was entered, and he could not be joined." Quære, whether this reason still holds: see stat. 3 & 4 W. 4. c. 42. s. 10.

(*b*) Exp. Wildman, 2 Ves. 115. Windham *v.* Withers, Str. 515. Gillard *v.* Wise, 5 B. & C. 134.

and discharging him on a letter of license, is no satisfaction as to *antecedent* parties; (c) nor if he be so taken, and afterwards *discharged* as an insolvent, will that protect *him* against any party except that one at whose suit he was taken. (d) There may be a satisfaction *pro tanto*, as by part payment, or the receipt of dividends under a commission of bankruptcy. (e)

Any material alteration of a bill or note, after it has been issued, though made by a mere stranger, operates as a satisfaction thereof, (f) except as against parties consenting to such alteration; and even though the parties consent, the instrument, after such alteration, is a new contract, and the old stamp will not suffice, (g) unless such alteration were made to correct a mistake, and render the bill what it was originally meant to have been. (h) Alterations in the date, sum, or time for payment, or the insertion of words authorising transfer, expressing the value received to be on a particular account, or adding a new maker or drawer, or an unwarranted place for payment, are material. (i) But the insertion of a mere memorandum, giving the right place for payment, or the correction of the

(c) *Hayling v. Mulhall*, Bl. 1235. *M'Donald v. Bovington*, 4 T. R. 825., these two cases seems referable to the next head, viz. *Discharge*.

(d) *M'Donald v. Bovington*, 4 T. R. 825.

(e) *Bacon v. Searles*, 1 H. Bl. 88. *Pierson v. Dunlop*, Cowp. 571. See *Johnson v. Kennion*, 2 Wils. 262.

(f) *Alderson v. Langdale*, 3 B. & Adol. 660. *Master v. Miller*, 4 T. R. 320. The latter of these cases decides, that no action can after such alteration be maintained *on the bill*. The former, that such an alteration made by the plaintiff operates as a satisfaction, not only of the bill, but of the debt for which it was given. I am not aware that it has yet been solemnly decided, that an alteration

of the bill by a stranger, operates as a satisfaction of the debt secured by it, though on principle I think it ought to have that effect.

(g) *Bowman v. Nicholl*, 5 T. R. 537.

(h) *Kershaw v. Cox*, 3 Esp. 246. *Jacob v. Hart*, 6 M. & S. 142. *Clark v. Blackstock*, Holt, 474.

(i) *Walton v. Hastings*, 4 Camp. 223. 1 Stark. 215. *Outhwaite v. Luntley*, 4 Camp. 179. *Bowman v. Nicholl*, 5 T. R. 537. *Cardwell v. Martin*, 9 East. 190. *Kershaw v. Cox*, 3 Esp. 246. *Knill v. Williams*, 10 East. 431. *Clark v. Blackstock*, Holt, 474. *Alderson v. Langdale*, 3 B. & Ad. 660. *Tidmarsh v. Groves*, 1 M. & S. 735. *Cowie v. Halsall*, 4 B. & A. 197. *R. v. Treble*, 2 Taunt. 328.

drawee's name to make it correspond with his acceptance, are not so. (*k*) Nor will the alteration affect its validity, if made with the consent of parties *before* it has issued. (*l*) A bill or note is *issued* when it is in the hands of some person entitled to make a claim upon it, not before; (*m*) and this is *prima facie*, so soon as it is passed away by the drawer or maker, or (*n*) (when the alteration is in the acceptance) accepted by the drawee. If a bill or note exhibit the appearance of alteration, it is for the holder to account for it. (*o*) But the mere cancellation, *by mistake*, of an acceptance or indorsement, is no satisfaction of the bill, or discharge to the parties whose signatures are so cancelled. (*p*)

4th, *Discharge*.—Discharge is when the right of action is not merely suspended, but destroyed, without any satisfaction, as by a release, or the provision of a Bankrupt or Insolvent Act. Thus an acceptance may be *waived*, either *expressly* or *impliedly*, so as to discharge the acceptor:—*expressly*, by an agreement to that effect, (*q*) or by a message to the acceptor on an accommodation bill, that the business was settled with the drawer: (*r*) *impliedly*, by the holder's taking to himself the

(*k*) Trapp *v.* Spearman, 3 Esp. 57. Marsen *v.* Petit, 1 Camp. 82 n. Farquhar *v.* Southey, 1 M. & M. 14.

(*l*) Downes *v.* Richardson, Bayley 5th ed. 116. Johnson *v.* D. of Marlborough, 2 Stark. 313.

(*m*) Downes *v.* Richardson. Cardwell *v.* Martin, 9 East. 190. Kennerley *v.* Nash, 1 Stark. 452.

(*n*) Walton *v.* Hastings, 4 Camp. 223. Outhwaite *v.* Luntley, 4 Camp. 179. Knill *v.* Williams, 10 East. 431. Tidmarsh *v.* Grover, 1 M. & S. 735. Cowie *v.* Halsall, 4 B. & A. 197. Johnson *v.* D. of Marlborough, 2 Star. 313.

(*o*) Henman *v.* Dickenson, 5 Bingham. 183. Bishop *v.* Chambre, 1 M. & M. 116. Johnson *v.* D. of Marlborough, and Downes *v.* Richardson, ante.

(*p*) Roper *v.* Birkbeck, 15 East. 17. Wilkinson *v.* Johnson, 3 B. & C. 428. Novelli *v.* Rossi, 2 B. & Ad. 765.

(*q*) Walpole *v.* Pulteney, Dougl. 236. 237. 248. 249. See Farquhar *v.* Southey, 1 M. & M. 14. See Ellis *v.* Galindo, cited. Dougl. 250 n. Stevens *v.* Thacker, Peake 187. Bayley, 5th ed. 208.

(*r*) Black *v.* Peele, Dougl. 236. 237. 248. 249. Bayley, *ubi supra*.

known consideration of the acceptance, as when the holder agreed with the acceptor, that he, the holder, would receive, instead of him, that benefit which had induced him to accept. (s) But neither length of time, silence, nor a declaration by the holder that he should look to the drawer for payment, are sufficient to discharge the acceptor. (t)

It is a maxim of law that if one principal in a contract, by any *act of his own*, discharge, or even give time, though but for a moment, to the other principal, he discharges all his sureties. In the contract by bill or note, the maker or acceptor is considered the principal, and the indorsers as his sureties; and consequently if the holder either discharge or suspend his remedy against the former, the latter, unless they have previously consented to it, (u) or afterwards promised to pay with knowledge of it, are all immediately discharged; (w) but a mere forbearance to sue the acceptor, without any valid agreement not to do so, will not discharge them, (x) nor will the taking a collateral security from the acceptor, (y) as a new bill, not in renewal of the old one. It seems that a *subsequent* indorser stands in the light of a surety for the *prior* ones, (z) and therefore, that if the holder discharge, or give time to a *prior* indorser, he will discharge those *subse-*

(s) *Mason v. Hunt*, Dougl. 284. 297.
Bayley, *ubi supra*.

(t) *Parker v. Leigh*, 2 Star. 228.
Farquhar v. Southey, 1 M. & M. 14.
Dingwall v. Dunster, Dougl. 235. 247.
Adams v. Gregg, 2 Star. 531. *Anderson v. Cleveland*, 13 East. 430. Bayley, *ubi supra*.

(u) *Clark v. Devlin*, 3 B. & P. 363.
See *Withall v. Masterman*, 2 Camp. 179. *Stevens v. Lynch*, 12 East. 38.

(w) *Exp. Smith, Co.* B. L. 5th ed. 168, 9. *English v. Darley*, 2 B. & P. 61. *Gould v. Robson*, 8 East. 576.

Withall v. Masterman, 2 Camp. 179.

De la Torre v. Barclay, 1 Stark. 7.

Rees v. Berrington, 2 Ves. jun. 540.

(x) *Walwyn v. St. Quentin*, 1 B. & P. 652. *Philpot v. Briant*, 4 Bingh. 717.
Orme v. Young, Holt, N. P. C. 84.
Combe v. Wolf, 8 Bingh. 162.

(y) *Pring v. Clarkson*, 6 B. & A. 14.
See *Price v. Edmunds*, 10 B. & C. 578.
Bedford v. Deakin, 2 Star. 178.

(z) See *vide* the observations of Tindal C. J. in *Bassett v. Dodgin*, 9 Bingh. 658.

quent to him. (a) But the discharge of a *subsequent* indorser does not discharge a *prior* one. (b)

It was once thought that the acceptor of an accommodation bill, or maker of an accommodation note, stood in the light of a surety, and that the holder would discharge him by discharging or giving time to the person for whose accommodation he accepted. (c) But this has often been questioned; and would not now be so decided, (d) especially where the holder, when he took the bill or note, did not know of the accommodation. However, in such a case it has been held that giving time to an accommodation acceptor will not discharge the drawer for whose accommodation he accepted. (e)

One of two joint-makers of a promissory note, though he may have signed for the other's accommodation, cannot, it seems, consistently with the principles above laid down, be so looked upon as his surety, that giving time to the other may discharge him. (f) Supposing even that he could, he would not be discharged by the holder's taking from the other maker a cognovit, defeasible upon the payment of instalments, the first of which would fall due before the maker giving it could have been sued to execution. (g)

(a) *Ellison v. Dezell*, Selw. N. P. 8th ed. 364. per Lord Eldon in *English v. Darley*, 2 B. & P. 62. See *Bank of Ireland v. Beresford*, 6 Dow. 234. *Smith v. Knox*, 3 Esp. 46. per Lord Eldon.

(b) *Hayling v. Mulhall*, 2 Bl. 1235. *Claridge v. Dalton*, 4 M. & S. 226.

(c) *Laxton v. Peat*, 2 Camp. 185. See *Bank of Ireland v. Beresford*, 6 Dow. 233. *Exp. Glendenning*, 1 Buck. 517.

(d) *Ruggett v. Axmore*, 4 Taunt. 730. *Fentum v. Pocock*, 5 Taunt. 192. *Kerrison v. Cooke*, 3 Camp. 362. *Mal-*

let v. Thompson, 5 Esp. 178. *Yallop v. Ebers*, 1 B. & Ad. 763. *Carstairs v. Rolleston*, 5 Taunt. 551. *Farquhar v. Southey*, 1 M. & M. 14. *Nichols v. Norris*, 3 B. & Ad. 41. *Harrison v. Cortauld*, 3 B. & Ad. 38.

(e) *Collott v. Haigh*, 3 Camp. 281.

(f) *Price v. Edmunds*, 10 B. & C. 582. *Garrett v. Jull*, Selw. N. P. 386. 8th edition. *Hall v. Wilcox*, 2 M. & M. 58. *Perfect v. Musgrave*, 6 Price.

(g) *Price v. Edmunds*, 10 B. & C. 582.

SECTION IX.—*Remedy upon Lost Bills and Notes.*

We have now seen how payment of a bill or note is, generally speaking, to be enforced or resisted. There are, however, some peculiar considerations respecting the mode of proceeding, when the instrument has been lost or destroyed.

If a bill or note has been lost *before it is due*, and was, when lost, in such a state that a transferee of the finder *bonâ fide*, and for a valuable consideration, might recover on it, the loser cannot succeed in an action upon it at law: (*h*) nor can any action be maintained for the consideration on which it was given, (*i*) since the bill operated as payment. So if a bill or note transferable by delivery be cut in halves, and half be lost, it has been held that the holder cannot sue at law upon the other half. (*j*) In Bayley on Bills of Exchange, 5th edition, p. 374, it is remarked that Lord Ellenborough assigned as a reason for the decision in this case, that “The other half might have immediately got into the hands of a *bonâ fide* holder for value, and he would have as good a right of suit on that, as the plaintiffs on the other half, which afterwards reached them; but the maker of a promissory note cannot be liable in respect of it to two parties at the same time;” and the learned author adds, “But *quære* whether a man who takes half a note does not take it at his peril.” There seems good reason for the doubt implied in this *quære*, and the case of *Meyer v. Johnson* may be considered open to review. However that may be, if the loser can shew that the bill was accidentally destroyed, or had no indorsements, except special ones, or was unindorsed and not transferable save by indorse-

(*h*) *Peirson v. Hutchinson*, 2 Camp. 214. et notas. *Davis v. Dodd*, 4 Taunt. 602. *Poole v. Smith*, Holt, 145. *Pooley v. Millard*, 1 Tyrwh. 331. *Hansard v. Robinson*, 7 B. & C. 90.

(*i*) *Champion v. Terry*, 3 B. & B. 295. *Alderson v. Langdale*, 3 B. & Ad. 662.

(*j*) *Meyer v. Johnson*, 3 Camp. 324.

ment, he may perhaps maintain an action either on it or for the original consideration, if any, since no one else can in such case acquire a title to it, *(k)* (unless, indeed, the defendant would have had a remedy over on the bill or note upon paying it;) *(l)* and in such a case if judgment go by default, the Court will grant a rule to compute principal and interest. *(m)* Sir John Campbell, in his note to *Pierson v. Hutchinson*, suggests that "another distinction may perhaps be taken with respect to a bill indorsed in blank, and lost *after* it has become due: as the finder could not in that case give an effectual right of action even to an indorsee for value and without notice, it may be thought that the acceptor cannot insist on an indemnity." However, he afterwards observes, that "as a plaintiff would make out a *prima facie* case by proving the acceptance and indorsement, it might be hard to expose the acceptors, without any indemnity, to the hazard of shewing by legal evidence that the bill had been lost after it became due." And accordingly the distinction in question has been virtually denied to exist. *(n)* In Bayley on Bills, 5th edition, p. 372-3, a distinction is drawn between this case and that in which judgment is allowed to go by default. The words are, "If a bill be lost after action brought thereon, and defendant suffer judgment by default, the Court will, on a copy verified by affidavit, refer it to the Master, to see what is due thereon, *(o)* especially where the bill has been shewn to defendant, and he has admitted his signature, and promised payment. But if the bill be lost after action brought, and defendant resist the action, and put the plaintiff to prove the bill, the

(k) Vide *Rolt v. Watson*, 4 Bing. 273. *Meyer v. Johnson*. *Pierson v. Hutchinson*, et notas. *Long v. Baily*, *ibid.* Vide *Hansard v. Robinson*, 7 B. & C. 90.

(l) *Champion v. Terry*, 3 B. & B. 295.

(m) *Flight v. Brown*, 2 Tyrwh. 312.

Brown v. Messiter, 3 M. & S. 281. *Allen v. Miller*, 1 Dowl. 320.

(n) *Poole v. Smith*, Holt, 144. and see *Pooley v. Millard*, 1 Tyrwh. 334. *per Curiam.*

(o) *Brown v. Messiter*, 3 M. & S. 281. Accord. *Allen v. Miller*, 1 Dowl. 420.

loss will be no excuse for the non-production of the bill, and plaintiff will not be entitled to recover. However, neither in *Brown v. Messiter*, nor in *Allen v. Miller*, does it appear on what terms the rule to refer was granted, or in what character the plaintiff sued; possibly he was either *payee* or *special indorsee*; for in a subsequent case, (p) the Court granted the rule, subject to the terms of producing to the Master a copy of the bill verified by affidavit, and its being also sworn that there was no indorsement in the bill itself.

In cases when the loser of a bill is precluded by the above rules from obtaining relief in a court of law, he may enforce payment in equity on giving a proper indemnity.(q) And st. 9 & 10. W. 3. c. 17. s. 3. enacts, "that if any inland bill be lost or miscarry, *within the time limited for its payment*, the drawer shall, on security given upon request, to indemnify him, if such bill be found again, give another bill of the same tenor with the first." It has been remarked that the equity of this statute seems to comprehend indorsements also, and that stat. 3 & 4 Ann. c. 9. which gives the same remedies on notes as were then in use on inland bills, would seem to extend it to notes.(r)

(p) *Flight v. Brown*, 2 Tyrwh. 312.

(q) 1 Ves. 341. 5 Ves. 338. 6 Ves. 812.

(r) Bayley, 5th ed. 131.

CHAPTER II.

CONTRACTS WITH CARRIERS.

A COMMON carrier is one who undertakes for hire to transport the goods of such as choose to employ him from place to place. (a) Of this description are the proprietors of stage waggons, and coaches which carry goods for hire; lightermen, hoymen, bargeowners, ferrymen, canal boatmen, owners and masters of ships, engaged generally in the transportation of goods for hire; and other persons, owning similar instruments of public conveyance. (b) A stage-coach owner, who carries passengers *only*, is not, properly speaking, a common carrier: he does not warrant the safety of the passengers, at all events; but only that so far as human care and foresight will go, he will provide for their safe conveyance. (c)

The duty of a common carrier is to carry the goods of all persons offering to pay his hire, (d) (unless, indeed, his carriage be full, or the goods are of such a kind as to be liable to extraordinary danger; or such as he is unaccustomed, or unable, to convey (e):) to take proper care of them in their

(a) 1 Sal. 249.

(b) 2 L. Raym. 909. 18. 5 T. R. 389. *Forward v. Pittard*, 1 T. R. 27. Bac. Ab. Carriers, A. *Morse v. Hue*, 2 Lev. 69. *Rich v. Kneeland*, Cro. Jac. 330. *Maving v. Todd*, 1 Stark. 72. *Brook v. Pickwick*, 4 Bing. 218. *Lovett v. Hobbs*, 2 Show. 128. *Upshare v. Aidee*, Com. 25.

(c) *Aston v. Heaven*, 2 Esp. 533. *Christie v. Griggs*, 2 Camp. 79. *Dudley*

v. Smith, 1 Camp. 167. *White v. Boulton*, Peake 81. *Robinson v. Dunmore*, 2 B. & P. 417.

(d) *Jackson v. Rogers*, 2 Shower, 329. Bac. Abr. Carriers. B. *Riley v. Horne*, 5 Bingh. 217.

(e) *Jackson v. Rogers*, 2 Show. 327. 1 Saund. 312 n. *Lane v. Cotton*, 1 L. Raym. 646. *Edwards v. Sherratt*, 1 East. 604. *Lovett v. Hobbs*, 2 Show. 128. *Batson v. Donovan*, 4 B. & A. 32.

passage, and to make a safe and right delivery of them. (*f*). At common law he stands in the situation of an insurer of the property intrusted to him, and is answerable for every loss or damage happening to it while in his custody, no matter by what cause occasioned, unless it were by the act of God, such as a tempest, or that of the King's enemies. In other cases, even his entire faultlessness does not excuse him: thus he is liable for damage done by accidental fire, or by a robbery. (*g*)

This being the rule of the common law, and regulating all cases in which there was no special contract between carriers and their employers, the former soon found it their interest to make agreements requiring a premium in proportion to the risk incurred, where the goods entrusted to them were beyond a certain value. This was generally done by inserting in the newspapers, distributing in handbills, and sticking up in their offices a notice, that they would not be accountable for any property beyond a certain value, unless insured and paid for at the time of delivery. If this notice were brought home to the knowledge of the employer (for that was indispensably necessary in order to render it available), (*h*) his consent to its terms was implied, (*i*) and the carrier became entitled to the protection for which he stipulated: (*k*) but these notices, as generally worded and interpreted by courts of law, only exonerated the carrier from liability for loss or damage occurring to uninsured goods, *without fault on his part*; for if he were guilty of wilful misconduct, or gross negligence, he was chargeable with the damage occasioned thereby, and his notice was not permitted to limit his responsibility, (*l*) unless the employer

(*f*) *Streeter v. Horlock*, 1 Bing. 34.
Hyde v. Trent & Mersey Nav. Co. 1 T. R. 27.
Ellis v. Turner, 8 T. R. 531.
Davis v. Garrett, 6 Bing. 716.

(*g*) *Dale v. Hall*, 1 Wils. 281. 1 Inst. 89.
Covington v. Willan, Gow, 115.

(*h*) *Kerr v. Willan*, 6 M. & S. 150.

(*i*) *Mayhew v. Eames*, 3 B. & C. 601.
Rowley v. Horne, 3 Bingh. 2.

(*k*) *Nicholson v. Willan*, 5 East. 507.

(*l*) *Smith v. Horne*, 2 B. Moore, 18.
Duff v. Budd, 3 B. & B. 177.

had been guilty of a wilful concealment of the nature and value of the property. (*m*)

The construction of these notices, and the necessity of proving that they had arrived at the employer's knowledge, giving rise to much litigation, the Legislature has enacted positive regulations on the subject. Those which concern carriers by water we will enumerate under the head *Contracts of Affreightment*; that concerning *Carriers by Land*, is st. 11 Geo. 4. and 1 W. 4. cap. 68. which enacts, that no common carrier *by land*, for hire, shall be liable for the loss or injury to any gold or silver coin, gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, watches, clocks, time-pieces, trinkets, bills, bank-notes, orders, notes, or securities for payment of money, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks, manufactured or unmanufactured, wrought up or not wrought up with other materials, furs (*n*) or lace, contained in any parcel, when the value exceeds the sum of 10*l.*; unless at the time of delivery the value and nature of the article shall have been declared, and the increased charges, or an engagement to pay the same, accepted by the person receiving the parcel. By sect. 2. common carriers on the delivery of such parcels exceeding the value of 10*l.* and so declared as aforesaid, may demand an increased rate of charges, which is to be notified by a notice in legible characters affixed in the office; and persons sending parcels are to be bound by such notice, without further proof of the same having come to their knowledge. By sect. 3. carriers shall, if required, give a receipt for the parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp-duty; and carriers who do not give such receipt when required, or affix the proper notice, are not entitled to

(*m*) *Batson v. Donovan*, 4 B. & A. 21. in this denomination, see *Mayhew v. Nelson*, 6 C. & P. 59.

(*n*) On the question what falls with-

the benefit of this act. Carriers cannot by a notice, limit their liability at common law, to answer for the loss of any articles in respect whereof they are not entitled to the benefit of this act. (o) Every office of such common carrier shall be deemed a receiving-house; any one proprietor shall be liable to be sued, and no action shall abate for the want of joining any co-proprietor. (p) Special contracts are not to be affected by this act. (q) Parties entitled to damages for parcels lost or damaged, may recover the extra charges for insurance. (r) This act does not protect any such common carrier from liability to any answer for losses or injury, arising from the felonious acts of any servant in their employ; nor does it protect any such servants from liability to answer for the consequences of his own neglect or misconduct. (s) Common carriers are not concluded as to the value of any parcel by the value declared. (t) Money may be paid into Court by common carriers in the same mode, and with the same effect as money paid into Court in any other action. (u)

(o) Sect. 4.

(p) Sect. 5.

(q) Sect. 6.

(r) Sect. 7.

(s) Sect. 8.

(t) Sect. 9.

(u) Sect. 10.

CHAPTER III.

CONTRACTS OF AFFREIGHTMENT.

SECT. 1. *Contract of affreightment by charter-party.*

2. *Contract for conveyance in a general ship.*

3. *Duties of master and owners.*

4. *Duties of merchants.*

5. *General average.*

6. *Salvage.*

7. *Dissolution of contracts of affreightment.*

CONTRACTS of affreightment fall under the general denomination of contracts with carriers, being contracts for the carriage of goods in vessels. On account, however, of the important place they occupy in the mercantile law, it has been thought proper to devote a separate chapter to their consideration. Contracts of this description are either—

1. Contracts of Affreightment by Charterparty ; or,

2. Contracts for the Conveyance of Goods in a general Ship.

We will speak separately of the form and peculiar incidents of each of these two contracts, and then jointly of the obligations which are equally imposed by both.

SECTION I.—*Affreightment by Charterparty.*

The contract by charterparty is defined to be that “by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods, on a determined voyage to one or more places ;” (a) the instrument by which it

(a) Abbott, part 3. c. 1.

is recorded, and which though often a deed, is not necessarily so, is generally executed by the owner of the ship, when made at the place of his residence, and sometimes by the master also. If made abroad, it can of course only be executed by the master, unless there be an agent of the owners, and in that case, if a deed, no action of covenant can be maintained on it against the owner, unless the party executing it had an authority by deed to do so; (b) though an action on the case may, for the breach of such of the general duties of a shipowner, as are not inconsistent with its terms; (c) and a voyage may be made up to a certain period under a charterparty by deed, and afterwards under a parol agreement, or *vice versâ*. (d) But the terms of a charterparty by deed, cannot be altered by parol, (e) though it may, like other mercantile instruments, be explained by the usage of trade. (f)

The instrument expresses the freight to be paid, and generally the burthen of the ship, by which latter specification the parties are not, however, concluded; for a merchant has been held liable on his covenant to furnish a full cargo, though he had furnished 260 tons, the specified burthen of the ship, which in reality contained 400. (g) It also comprises covenants from the owners that the ship shall be tight, staunch, furnished with all necessaries, that she shall be ready by a certain day to receive, and shall wait a certain time to ship her cargo, shall sail at a particular time for the destined port, deliver the goods safely there, and be properly found in men and stores during the voyage, to the best of the owner's endeavours. It may, of course, comprise any other engagements which the merchant thinks proper to exact and the owner to concede.

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|---|---------------------------------------|
| (b) Harrison v. Jackson, 7 T. R. 207. and Horsley v. Rush, there cited. | 224. Thompson v. Brown, 7 Taunt. 656. |
| (c) Leslie v. Wilson, 3 B. & B. 171. | (f) Donaldson v. Forster, Abb. P. 3. |
| (d) White v. Parkin, 12 East. 578. | c. 1. s. 17. |
| (e) Gibbon v. Young, 2 B. Moore. | (g) Hunter v. Fry, 3 B. & A. 421. |

The merchant usually covenants to load and unload within a specified time, or if he detain the ship for a longer time, which he sometimes receives liberty to do, to pay a daily sum, which, as well as the delay itself, is called *demurrage*. It commonly ends with a clause purporting to bind the ship's freight and cargo in a pecuniary penalty, to the performance of the contract: but this seems to be inoperative. (*h*)

The stipulation must of course be strictly performed on both sides. With respect to the time allowed for loading and unloading, it is held, that the merchant must pay *demurrage* for any delay beyond the arranged period, even though not attributable to his fault, but to some unforeseen event, such as the crowded state of the docks; for he has expressly expressly engaged and is bound by the terms of his own positive contract: (*i*) so, though he may not have been apprized of the ship's arrival, (*k*) or the bill of lading have not come to his hands; without which, or an indemnity, the master, as he has a right, refuses to deliver the goods. (*l*) But if a certain demurrage be agreed on for the time during which the ship may be obliged to wait for convoy, or to receive a cargo, it ceases, in the former case, as soon as the convoy is ready; (*m*) and in the latter, as soon as the cargo is laden and the clearances obtained, (*n*) though the ship be longer detained by tempestuous weather, or set out and be driven into port again. The days mentioned in the clause of demurrage, are by the custom of merchants in London understood to be working days; (*o*) but it is proper to state whether working or running days be intended.

It often becomes important to determine whether, according to the true construction of a charterparty, the possession of

(*h*) Abbot. P. 3. c. 1.

(*i*) Abbott. P. 3. c. 1.

(*k*) Harman v. Clarke, 4 Camp. 159.

(*l*) Jesson v. Solly, 4 Taunt. 52.

(*m*) Lannoy v. Werry, 2 Bro. P. C. 60.

(*n*) Jamieson v. Laurie, 6 Bro. P. C.

474.

(*o*) Cochrane v. Retburgh, 3 Esp.

121.

the ship passes to the merchant, so as to constitute him an owner *pro hac vice*, and cause the general owner to stand to him in the relation of a lessor, rather than a carrier. On this question may depend the owner's right of *lien* for the freight, of which description of remedy we shall speak more fully hereafter, (p) or his own liability to the suit of third parties : (q) it is impossible, however, to lay down general rules for its solution, which must be in each case gathered from the terms of the instrument, or its purpose and object, as where, in case of a ship let to the commissioners of the Transport Board, the possession was held to pass to the King, on account of the nature of the service on which she was to be engaged. (r)

SECTION II.—*Contract for conveyance in a general ship.*

When the master and owners of a ship engage with separate merchants to convey their goods to the place of her destination, the contract is said to be for conveyance in a *general ship*. It is usual to advertise such ships in the newspaper, or in cards and handbills; and care should be taken to insert nothing in these advertisements which it is not the ship-owner's intention to make strictly good; since it is not clear that some of the terms of such advertisement may not be looked upon as incorporated into the contract. (s) But the instrument to which reference is generally had for the terms of such a contract is the *Bill of Lading*; this the master must sign and deliver to the holder of the receipt given by him for the goods when shipped, on having that receipt returned to

(p) See Abbott, part 3. cap. 1. and Small v. Moats, 9 Bingh. 574.

(q) Newberry v. Colvin, 1 Tyrwh. R. 67. Dean v. Hogg, 10 Bingh. 351.

(r) Trinity H. v. Clarke, 4 M. & S.

288. See Dean v. Hogg, 6 Carr. & P. 58. 10 Bing. 350. Yates v. Railstone, 3 Taunt. 293.

(s) Abbott. part 3. c. 2.

him. Several parts, (*i. e.* copies,) of the bill of lading are commonly made out, of which the merchant sends one or two to the person for whom the goods are destined, and retains one for himself. The master also must take care to have a part made out for his own use.

The following is the form of a Bill of Lading.

J. W. } “ Shipped in good order, by A. B., merchant, in
No. 1. } and upon the good ship called the — whereof
a. 20. } C. D. is master, now riding at anchor in the river
Thames, and bound for Barcelona, in Spain, 20
bales, containing 100 pieces of broad cloth, marked
and numbered as per margin, and are to be delivered
in the like good order and condition, at Barcelona
aforesaid; (the act of God, the King’s enemies, fire,
and all and every other dangers and accidents of the
seas, rivers, and navigation, of whatever nature and
kind soever, excepted,) unto E. F. merchant there, or
his assigns, he or they paying freight for the said
goods — per piece freight, with primage and average
accustomed. *In Witness* whereof the master or purser
of the said ship hath affirmed to three bills of lading
of this tenor and date; one of which bills being ac-
complished, the other two to stand void.

Dated at London, the — day of —”

In the above form a consignee of the goods, viz. E. F. is mentioned, to whom, or to his assigns they are to be delivered. But the bill is sometimes made out for delivery to the *consignor*, or his assigns, and sometimes “to order or assigns,” which import an engagement to deliver to the person whom the consignor shall nominate, and his assigns. Other clauses may be, and sometimes are, introduced into the bill of lading, according to the nature of the contract between the parties to it, to provide, for instance, for the payment of

demurrage by the consignee, the effect of which will be to raise an implied undertaking on his part to pay it, if he receive the goods under such bill of lading, and that though he have no valuable interest in them, for (t) “the acceptance of goods in pursuance of a bill of lading, whereby the shipper has made the payment of freight or demurrage a condition precedent to delivery, is evidence of a contract by the consignee to pay such demand.” We shall have occasion to advert again to this subject.

It has been seen that the bill of lading is usually made out for delivery of the goods to some person, *ex. gr.* E. F. or *his assigns*. E. F. can, therefore, by naming *an assign*, transfer his right to them to some other person. The mode of appointing an *assign* is by indorsing and handing over to him the bill of lading, which is thus a negotiable instrument; accordingly it is the common practice of merchants to negotiate it, and by such assignment the property in the goods is held to pass to the indorsee of the bill of lading. (u) Nay, though the consignee named in the bill of lading should become insolvent, without having paid for the goods, yet his assignment made for a valuable consideration, and without notice to the assignee, that the goods were not paid for, or that they were paid for by bills sure to be dishonoured, has been held to pass them absolutely to his assignee, and deprived the consignor of his right to stop *in transitu*, which, as against the original consignee, he might have exercised. (w) But if the assignee of the bill of lading have not acted *bonâ fide*, for in-

(t) *Scaife v. Tobin*, 3 B. & Ad. 523. *per Parke, J.*

(u) *Wright v. Campbell*, 4 Burr. 2046. 1 Bla. 628. *Caldwell v. Ball*, 1 T. R. 205. *Hibbert v. Carter*, 1 T. R. 745.

(w) *Lickbarrow v. Mason*, 2 T. R. 63. which was reversed in error. 1 H. Bl. 357. and error brought on the reversal in

Dom. Proc. and the cause directed to be tried anew, which it was, and adjudged as at first, 5 T. R. 683. which judgment was acquiesced in. See *Newsom v. Thornton*, 6 East. 17. *Solomons v. Nissen*, 2 T. R. 674. *Dick v. Lumsden*, Peake, N. P. C. 190. *Haille v. Smith*, 1 B. & P. 563. and see st. 6. G. 4. cap. 94. below cited.

stance, if he knew that the consignee was insolvent, and assisted to defraud the consignor of the price of his goods, (x) he stands in the same situation as the consignee, and the consignor retains his right to stop *in transitu*; and if there be any condition either in the bill of lading, or in the indorsement thereof, *ex. gr.* if the goods are to be delivered, *provided E. F. pay a certain draft*, all subsequent indorsees take subject to that condition, and have no title till it is complied with. (y)

The above observations apply to the case of consignment of goods to a *purchaser*; for where they were consigned to a *factor*, his power of altering the property in them, by indorsement of the bill of lading, was less extensive, since it was thought that though he might bind his principal by a *sale* of the bill of lading, because a factor's usual employment is to sell, yet he could not by a pledge thereof, for that is not within the scope of his authority; (z) and though stat. 6 G. 4. cap. 94. has now given effect to his *pledge* also, yet it has not given it in all cases the same effect, as if the goods were his own property. By that statute, which was passed to amend stat. 4 G. 4. c. 83., the subject is at present regulated. Its provisions are set out and commented upon, *ante*, Book 1. ch. 3. page 63.

SECTION III.—*Duties of Master and Owners.*

We now come to consider the obligations which the two sorts of contracts of affreightment equally impose. These are divided by a celebrated author, (a) into duties to be performed,

1. By the master and owners.

2. By the merchant.

(x) *Cumming v. Brown*, 9 East. 506.

(y) *Barrow v. Coles*, 3 Camp. 92.

(z) *Newsom v. Thornton*, 6 East. 17.

Martin v. Coles, 1 M. & S. 140. *Shipley*

v. Kymer, *ibid.* 484. *Solly v. Rathbone*,

2 M. & S. 298. *Cochran v. Irlam*, *ibid.*

301. see *ante*, p. 62.

(a) *Abbott P.* 3. c. 3.

The former class are again divided into those which respect, 1st, the preparation for; 2d, the commencement; 3d, the course; and 4th, the completion of, the voyage.

1. With respect to the *preparation*, (*b*) the vessel must be tight, staunch, and strong, and furnished with proper necessities; this a charter party usually requires; but it is equally required by law, though there be no charter party. (*c*) The same observation applies to her crew, who must be sufficient in number and ability; (*d*) so if usage or the law of the country require that she should have a pilot, there must be one on board, as there must also when the ship comes in the course of her voyage to any place where there is an establishment of pilots, and it is possible to procure one before she enters on the difficult part of the navigation. (*e*) The goods are to be taken by the master or owner, whose responsibility commences with their receipt, from the shipper, and stored carefully on board, and all things necessary for that purpose, such for instance as ropes, must be provided by the master, since if the goods be injured by or in consequence of improper stowage, he and his owners are responsible. (*f*) The master must also have on board the proper manifest and other documents necessary for the protection of the vessel, and must carry no false papers or contraband goods, whereby she may be forfeited. He must, as we have seen, give a receipt for the cargo to the shipper, and sign bills of lading as he may direct, on having that receipt returned to him. If by agreement the master is to proceed to a particular place for the cargo, he must use due diligence, or the freighter may be discharged. (*g*)

2dly and 3dly. With respect to the commencement and

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|---|---|
| (<i>b</i>) See generally Abbot, p. 3. c. 3. | 160: Phillips v. Headlam, 2 B. & Adol. |
| (<i>c</i>) Coggs v. Bernard, 2 Ld. Raym. | 384. |
| 909. Lyon v. Mells, 5 East. 428. | (<i>f</i>) Goff v. Clinkard, cited 1 Wils. |
| (<i>d</i>) Shore v. Bentall, 7 B. & C. | 282. |
| 798 n. | (<i>g</i>) Freeman v. Taylor, 8 Bingh. 124. |
| (<i>e</i>) Law v. Hollingsworth, 7 T. R. | |

continuance of the voyage—the proper clearances being obtained, the ship must set sail, and, if there be a stipulation to that effect, must do so under the safeguard of a convoy; concerning the nature of which escort, and the rules respecting it, we treat under another head, viz. that of *insurance*. She must then proceed to her destined port without deviation, for if she deviate unnecessarily, and is lost, the master and owners are responsible, although the loss be by the act of God or the King's enemies: *(h)* in fine, the master is to use every effort to convey the cargo safely to its destination; and if by reason of a storm, or some other unexpected cause, it becomes impossible to do so in his own vessel, he is to do what a prudent man would think most for the benefit of all concerned: what that may be it is impossible to anticipate; we have however high authority for saying, that “Transshipment for the place of destination, if it be practicable, is the first object, because that is in furtherance of the original purpose; if that be impracticable, return or a safe deposit *(i)* may be expedient; the merchant should be consulted if possible. *(k)* A sale is the last thing the master should think of, because it can be only justified by that necessity which supersedes all human laws: if he sell without necessity, his owners, as well as himself, will be answerable to the merchant; *(l)* and they will be equally answerable if he place the goods at the disposal of a Vice-Admiralty Court in a British colony, and they are sold under an order of the Court, such Court having no authority to order a sale; *(m)* and the persons who buy under such circumstances will not acquire a title as against the merchant, *(n)* but must answer

(h) Parker v. James, 4 Camp. 112.
Davis v. Garrett, 6 Bingh. 723.

(i) See an instance of deposit, which seems not to have been questioned, in Liddard v. Lopes and another, 10 East. 526.

(k) Wilson v. Millar, 2 Stark. 1.

(l) Freeman v. East I. Comp. 5 B. & A. 617. Wilson v. Dickson, 2 B. & A. 2.

(m) Cannan v. Meaburn, 1 Bingh. 243. 8 B. Moore. 127.

(n) Morris v. Robinson, 3 B. & C. 196.

to him for the value of the goods." (o) However, the master's authority extends to hypothecate, or even sell a part of it where it is necessary to do so for repairs, in order to the preservation of the entire venture; (p) and if he do the latter, the merchant on the ship's safe arrival at the place of destination will have a right to receive what the goods would have fetched if brought thither, (q) or may elect to take the sum they actually sold for, and may in that case, if he please, deduct it from the freight. (r)

4thly. On the *completion of the voyage*, the master must have the vessel properly moored, report his ship and crew, exhibit his manifest and other papers to the proper officers, and deliver up the cargo to the consignee named in the bill of lading, on payment of the freight, and other charges in respect thereof; these other charges are generally *primage* and *average*, the nature whereof will presently be stated; and the master need not in general part with the goods till they are liquidated; if, indeed, it appear from the bill of lading that the freight or other charges have been paid, he is estopped from claiming them as against the assignee of such bill of lading; (s) nor can he detain the goods of one person for charges upon those of another, though he may any part of what is consigned to one and the same person for the charges upon it all; (t) the manner of delivering up the goods, and consequently the period at which the master ceases to be responsible for them depends, in the absence of agreement, on the custom of the place. (u) If the consignee send a lighter for the goods, the master must, by the custom of the river

(o) Abbott, P. 3. c. 3. s. 8.

(s) Howard v. Tucker, 1 B. & Ad.

(p) The Gratitude, 3 Rob. A. R. 715.

240.

(t) Soldergreen v. Flight, Abbott, P.

(q) Alers v. Tobin, Abb. P. 3. c. 3. 3. c. 3. s. 11. cited 6 East. 622.

s. 10.

(u) Wardell v. Mourillyan, 2 Esp.

(r) Campbell v. Thompson, 1 Stark. 603.

490.

Thames, watch them in the lighter till it is fully laden, (*w*) but not afterwards. (*x*)

All these duties which the law imposes upon the ship-owners and his agents, are, after all, no more than consequences of the general rule before stated, respecting carriers, viz. that they are responsible at common law for every thing except the act of God and the King's enemies. However, this, their common law liability, is usually narrowed by their own express stipulations in the charterparty or bill of lading, and has also been qualified by the intervention of the legislature.

The bill of lading contains, as we have seen, these words; "the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigations, of whatever nature and kind soever, excepted." The first two of these were, as we have seen, exceptions, even at common law; and the third was made so by stat. 26 Geo. 3. c. 86. s. 2., which enacts, "that no owner or owners of any ship or vessel shall be subject or liable to answer for, or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandize whatsoever which shall be shipped, taken in, or put on board, any such ship or vessel, by reason or means of any fire happening to or on board the said ship or vessel."

On this section Lord Tenterden remarks, (*y*) that the master is not mentioned therein, and that it may therefore be doubtful whether his responsibility is in this case removed by the statute, but that the insertion of the word fire in the bill of lading certainly removes it.

The same statute enacts (*z*) that no *master*, owner, or owners of any ship or vessel, shall be liable to answer for, or make good any loss or damage which may happen to any gold, silver, diamonds, watches, jewels, or precious stones,

(*w*) Catley v. Wintringham, Peake, c. 3. s. 12.
N. P. C. 150.

(*y*) Abbott, P. 3. c. 4.

(*x*) Robinson v. Turpin, Abb. P. 3.

(*z*) Sect. 3.

which shall be shipped, taken in, or put on board any such ship or vessel, *by reason or means of any robbery, embezzlement, making away with, or secreting thereof*, unless the owner or shipper thereof shall at the time of shipping the same, insert in his bill of lading, or otherwise declare in writing to the master, owner, or owners of such ship or vessel, the nature, quality, and value of such gold, silver, diamonds, watches, jewels, or precious stones.

By stat. 6 G. 4. c. 125. (a) s. 53. owners and *masters* of ships are exempted from liability for any damage arising from the want of a licensed or duly qualified pilot, unless it be proved that such want arose from any refusal to take one on board, or from wilful neglect, in not heaving to, or using all practicable means consistent with the ship's safety, for the purpose of taking on board any pilot who may offer: and sect. 55. exempts them from liability for damage arising from the neglect, default, incompetency, or incapacity of any licensed pilot in charge of the vessel, so long as such pilot shall be duly qualified to have charge of the vessel, or no duly qualified pilot shall have offered to take charge thereof.

It will be seen that the common law liability of ship-owners is discharged to a considerable extent by these enactments; where it remains, it is restricted to a certain ascertainable amount by

Stat. 7 Geo. 2. cap. 15. which exempts the owners from responsibility for loss, by reason of any embezzlement, secreting, or making away with, by the master or mariners; or for any act, matter or thing, damage or forfeiture, done, occasioned, and incurred by the same persons, without the privity of the owners, *further than the value of the ship, with her appurtenances, and the freight due, or to grow due for the voyage wherein such loss happened.* (b)

St. 26 G. 3. cap. 86. s. 1. extends the provisions of this

(a) Pilotage Act.

(b) Sect. 1. See *Sutton v. Mitchell*,
1 T. R. 18.

act to *all* cases of robbery, though the master or mariners be not concerned therein.

By st. 53 G. 3. cap. 159. owners are not liable to answer for or make good any loss or damage arising by reason of any act, neglect, matter or thing, done, committed, and occasioned without the fault and privity of such owner or owners, which may happen to any goods, wares, merchandizes, or other thing laden or put on board the ship, *further* than the value of the ship and freight due, or to grow due, during the voyage which may be in prosecution, or contracted for at the time of the happening of the loss.

This statute further defines what shall be considered *Freight*, within its meaning, (c) and that of the two prior acts ; and orders, that distinct losses happening during the same voyage, or same interval between two voyages, shall be compensated in the same way, and to the same extent as if no other loss had happened during the same voyage or interval ; and, as well as the two former ones, provides a proportionable compensation in cases where the value of the ship and freight is less than the total amount of losses, and a mode of distribution, and relief in equity. But this act does not extend to vessels used solely in rivers and inland navigations, nor to any ship not duly registered according to law ; nor do any of the acts extend to lighters and gabbets. (d)

The benefit of the three last-mentioned acts does not extend to masters ; and the last contains a provision against relieving the master who happens to be a part owner from responsibility ; yet if he be sued along with the part owners, he will be protected as well as they : for it is a rule, that the damages given against co-defendants must be one and the same sum. (e)

(c) Sect. 2.

(e) *Wilson v. Dickson*, 2 B. &

(d) *Hunter v. M'Gown*, 1 Bligh, 573. A. 2.

SECTION IV.—*Duties of the Merchant.*

The merchant who has taken a ship to freight must lade her within the stipulated time, and with the stipulated cargo, and must put on board no contraband goods, whereby she may be subjected to forfeiture. For a default in any of these particulars, he will be liable to make good the injury sustained in consequence. He must also pay the charges due on his commodities; these are usually *primage*, *average*, *demurrage*, and *freight*.

Primage is a small customary payment to the master for his care and trouble.

Average denotes several petty charges, such as towage, beaconage, &c. which it would be difficult and useless to enumerate; there is a more important charge called *General Average*, of which we shall treat in the next section.

Demurrage hath been already spoken of. (*f*)

Freight is the payment made for the conveyance of the merchandize to its destination; it denotes the price of *carriage*, not of receiving goods *to be carried*; and, therefore, though a merchant may, of course, contract to pay a sum of money to a ship-owner for taking goods on board, yet such payment is not, strictly speaking, *freight*. (*g*) Hence it follows, that no freight becomes due, unless the carriage of the goods be completely performed. (*h*) In consequence of this rule, when a ship has been engaged to sail from one port to another, as from A. to B. and back again, it often becomes important to know whether this employment is to be looked upon as consisting of one or of two distinct voyages; since if the ship be

(*f*) See ante and see *Evans v. Forster*, 321. *Andrew v. Moorhouse*, 5 Taunt. 1 B. & Adol. 119. *Brouncker v. Scott*, 4 435. *Abbott*, p. 3. c. 7.

Taunt. 1. and 5 Bingh. 188.

(*h*) *Mashiter v. Buller*, 1 Campb.

(*g*) *Blakey v. Dickson*, 2 B. & P. 84.

lost after her transit from A. to B., but before that from B. back to A. has been completed, freight will, by adopting the latter construction, be due for the carriage from A. to B. but not by adopting the former. In solving this question, the Court must be guided by the intention of the parties, as collected from the words and subject matter of their agreement. (*i*)

The owner will not, however, lose his freight in consequence of an interruption, without his fault, of the voyage, which is afterwards completed, such as a capture and recapture; (*k*) and if the goods have been thrown overboard for the ship's preservation, the merchant must pay freight, and be repaid by a general average. So if a part be sold for necessary victuals or repairs, the owners pay the merchant the value, and receive the freight from him: and if the ship and cargo be taken, retaken, and carried by the recaptors into a port short of its destination, and there, in consequence of some legal doubt, or the merchant's delay, the ship be restored before the cargo, the owners need not wait to convey the latter to its destination, but are entitled to the freight, subject to salvage. (*l*) There are also some cases in which a part payment of freight may be claimed: these shall be presently considered.

Where goods are sent in a general ship, the amount of freight depends on the agreement of the parties, or the value of the service performed, estimated according to the usage of trade in like cases. If there be a charterparty, and a gross sum is to be paid for the whole or part of a ship, it becomes due, although the merchant do not provide a complete lading. If the payment be so much per ton, it must be calculated on the number of tons the ship or part thereof contains; not on the number mentioned in the description in the charterparty, (*m*) or the quantity of goods laden on board. On the

(*i*) *Mackrell v. Simond. Byrne v. Pattinson*, Abbott, part 3. c. 7. s. 18.

(*l*) Abbott on Shipping, part 3. c. 7. ss. 5, 6.

(*k*) *The Race Horse*, 3 Rob. A. R. 101. *Beale v. Thompson*, 3 B. & P. 420.

(*m*) *Hunter v. Fry*, 2 B. & A. 421.

other hand, if the master improperly refuse to take the entire quantity of goods agreed on, he will, nevertheless, if the payment was to be per cask, or bale, have a right to a compensation for what he has carried ; (*n*) as he will in case of his deviating, (*o*) or sailing with his ship out of repair, (*p*) or not sailing according to stipulation with the first wind or convoy ; (*q*) the rule being, as stated by Lord Ellenborough, (*r*) that " unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered a condition precedent, but a distinct covenant ; for the breach of which the party injured may be compensated in damages."

If the agreement be to pay so much per month, week, or other aliquot part of the voyage, the merchant takes the risk of its duration, and the freight will begin to run against him from the day the ship breaks ground, and continue to do so, not only while she is at sea, but during any unavoidable delay which does not suspend the contract, *ex. gr.* for repairs. (*s*) But if the agreement be in any other form, the owner takes the risk of the duration of the voyage, and is only entitled to the same amount, however long it may continue.

The owner has a lien on the goods until the freight is paid, if he do not agree to waive it. Whether he exercise that right or no, he may sue the charterer, upon his contract to pay freight. (*t*) When there is no charterparty, and the consignee is by the terms of the bill of lading to pay freight, Lord Tenterden expressed an opinion at N. P. that the ship-

(*n*) Ritchie *v.* Atkinson, 10 East. 295.

(*o*) Bornman *v.* Tooke, 1 Campb. 377.

(*p*) Havelock *v.* Geddes, 10 East. 555.

(*q*) Constable *v.* Cloberie, Palmer, 397. Hall *v.* Cazenove, 4 East. 477.

(*r*) Davidson *v.* Gwynne, 12 East. 381.

(*s*) Havelock *v.* Geddes, 10 East. 555. Ripley *v.* Scaife, 5 B. & C. 167. See Beale *v.* Thompson, 3 B. & P. 405.

(*t*) Tapley *v.* Martens, 8 T. R. 451. Christy *v.* Row, 1 Taunt. 300. Shephard *v.* De Bernales, 13 East. 565. Abbott on Shipping, 5th ed. 281.

per was not liable.(u) But it has since been decided *in banco* (v) that where a bill of lading expressed goods to be consigned *on account and risk* of William Beckford, to Messrs. P. and W., or their assigns, *they paying freight*, the owner had a right to sue the consignor, Beckford, for freight, in the absence of any evidence of a custom among merchants to the contrary. It might, however, be otherwise, if the consignment were from vendor to vendee.(w) In such a case it might be urged that the consignor in employing the ship-owner, acted as agent for the consignee;(x) and perhaps *Dommett v. Beckford*, and the opinion of Lord Tenterden in *Drew v. Bird* might, if this distinction were adopted, prove not completely irreconcilable.

The consignee or indorsee of the bill of lading may be sued, if he have received the goods *in pursuance of a bill of lading*, imposing the payment of freight upon him;(y) at all events, in cases where there is no charterparty. But the acceptance of the goods is not *of itself* sufficient to impose charges in respect thereof, although other circumstances concurring with acceptance may;(z) and if there be not only a bill of lading, but a charterparty containing an express contract by the charterer to pay freight, the law will not, from his mere receipt of goods under the bill of lading, raise an implied promise from an indorsee to do so, in the absence of an express one.(a)

There are some cases in which an utter stranger to the con-

(u) *Drew v. Bird*, 1 M. & M. 157.

(v) *Dommett v. Beckford*, 2 Nev. & Mann. 376.

(w) See *Barker v. Havens*, 17 Johns. Rep. 234. cited 1 M. & M. 156 in notis.

(x) See 1 Nev. & Mann. 420.

(y) *Roberts v. Holt*, 2 Shower, 443. *Cock v. Taylor*, 13 East. 399. *Bell v. Kymer*, 5 Taunt. 477. See *Mitchenson v. Begbie*, 6 Bingh. 193. He cannot discharge himself by seizing them under

a sham execution against the consignor, instead of accepting them under the bill of lading, *Lucas v. Nockells*, 10 Bingh. 157.

(z) *Wilson v. Kymer*, 1 M. & S. 157. *Scaife v. Tobin*, 3 B. & Adol. 523. *Ward v. Felton*, 1 East. 507.

(a) *Moorsom v. Kymer*, 2 M. & S. 303. See *Pinder v. Wilks*, 5 Taunt. 612. *Abbott on Shipping*, 287.

tract may become chargeable with freight. Thus if a neutral vessel laden with the goods of one of two belligerents, be captured by the other, the ship is to be restored, and the goods confiscated; the captor paying the full freight; for he has by his own act put himself in the place of the merchant, with respect to the goods, and waived the completion of the voyage; (b) but this is only where the goods are such as a neutral ship may, by the law of nations, carry. (c) On the other hand, if the ship be hostile, and the goods those of a neutral, the captor is entitled to the freight, if he convey them to their destination, but not otherwise. (d)

It has been mentioned that a *part-payment* of freight may sometimes be claimed: this happens—1st, In some cases in which only part of the cargo is delivered; 2nd. In some where part only of the voyage is performed. In the former case, if the ship were a general one, or if she was chartered for freight to be paid according to the quantity of the goods, freight is due for as much as is delivered. (e) But if a ship, chartered at a specific sum for the voyage, without reference to the quantity of goods, were to lose part of her cargo, it has been doubted whether freight would be payable for the remainder. (f) Yet certainly the hardship of the case would induce the Court to construe such a charterparty as favourably as the strictness of law would permit: possibly a new contract might be held to arise by implication, such as we are now going to advert to.

For, 2ndly, If the ship, having performed part of her voyage, be disabled from completing the remainder, the master may, as we have seen, transship the goods, in order to convey

(b) *The Copenhagen*, 1 Rob. A. R. 289.

(c) Abbott, P. 3. c. 7. s. 6.

(d) *Fortuna*, 4 Rob. A. R. 278.

(e) *Christy v. Row*, 1 Taunt. 300.

(f) *Malyne*, Lex Mercat. p. 100. *Bright v. Cowper*, 1 Brownlow, 21. and

the observations in Abbott, p. 1. ch. 7. s. 9. See also *Roberts v. Havelock*, 3 B. & Ad. 406. *Sinclair v. Bowles*, 9 B. & C. 92. in which the Judges seem to have pointed at a similar distinction as existing in the general law of contracts. See also *Read v. Rann*, 10 B. & C. 440.

them to their destination. If, however, the merchant prefer receiving them where they are, he must pay freight *pro ratâ itineris peracti*. (g) And this not on the original contract of affreightment, upon which the owner, if obliged to sue, must not proceed, but under a new one, which the law *implies* from the merchant's behaviour. (h) If the master, being at too great a distance from the merchant to consult him, and acting for the best, direct a sale, having good grounds to believe it necessary, there seems no reason why an implied contract to pay freight *pro rata*, should not arise on the merchant's receiving the proceeds, as it certainly will, where the goods are seized, and sold by a *competent* Prize Court, under a sentence which is afterwards reversed, and the proceeds restored. (i) But if the master sell without necessity, or refuse to forward the goods to their destination, no freight is due. (k) And as, in the absence of express stipulation, the voyage does not commence till the ship has broken ground, her owners, if she be prevented from sailing, are entitled to no compensation for work already done, such as loading the goods on board. (l)

SECTION V.—*General Average.*

There are two charges which frequently accrue during the prosecution of the adventure, and fall sometimes on the merchant, sometimes on the owner, and sometimes on both; these are general average and salvage.

Whatever damage or loss is incurred by any particular part of the ship or cargo, *for the preservation of the rest*, is called

(g) Malyne, 98. Lutwidge v. Grey, Abbott, P. 3. c. 7. s. 13. The Copenhagen, 1 Rob. A. R. 289.

(h) Luke v. Lyde, 3 Burr. 882. 1 Black. 190. Cook v. Jennings, 7 T. R. 381. Molloy v. Backer, 5 East. 316.

(i) Baillie v. Moudigliani, Park, c. 2. p. 70.

(k) Hunter v. Prinsep, 10 East. 378. Liddard v. Lopes, 10 East. 526. Osgood v. Groning, 2 Campb. 466.

(l) Curling v. Long, 1 B. & P. 634.

General Average: that is, the several persons interested in the ship, freight, and cargo, shall contribute their respective proportions to indemnify the owner of the particular part against the damage which has been incurred, *for the good of all*; (m) but the damage must be for the general good; and consequently, in order that there may be a general average, the whole adventure must have been in jeopardy. (n) It need not, however, consist in the actual loss or injury of the subject matter, in respect of which average is claimed; but may be any expense incurred with relation to it for the common good, *ex. gr.*, that of unloading the cargo, that the ship may be repaired; (o) but the loss must have been *voluntarily* incurred; for masts and sails destroyed, in consequence of the necessity of carrying an unusual press of canvass, are not subjects of general average, (p) though they are so, if cut away, and abandoned for the preservation of the ship. (q) If a ship be obliged to go into port for necessary repairs, the wages of the seamen during the delay are not in general a subject of average; (r) though it seems doubtful whether they would not, if the damage to be repaired itself were so; (s) nor is the injury done to the ship, the ammunition lost, or the expense of healing sailors wounded, in an action with the enemy, reimbursed according to our law by a general average. (t)

With respect to the articles which contribute, it is held that all objects of value are not liable, but only those which fall under the denomination "*merces*," hence provisions are exempt, (u) as is the wearing apparel of passengers. The

(m) *Da Costa v. Newnham*, 2 T. R. 407. *Williams v. London Assurance*, 1 M. & S. 318. *Price v. Noble*, 4 Taunt. 123.

(n) *Nesbett v. Lushington*, 4 T. R. 783.

(o) *Plummer v. Wildman*, 3 M. & S. 482.

(p) *Covington v. Roberts*, 2 N. R.

378. *Power v. Whitmore*, 4 M. & S. 141.

(q) *Birkley v. Presgrave*, 1 East. 220.

(r) *Power v. Whitmore*, 4 M. & S. 141.

(s) *Abb.* 450.

(t) *Taylor v. Curtis*, 2 Marsh. 309. 6 Taunt. 608.

(u) *Brown v. Stapylton*, 4 Bingham.

119. see *Abbott*, P. 3. c. 8.

owners contribute according to the clear value of ship and freight, at the end of the voyage, after deducting the expense thereof. But mariners do not contribute for their wages, save in the instance of the ransom of the ship, which is, however, prohibited by law in this country. (v)

As to the mode of contribution, goods to be replaced are valued when the average is calculated at the ship's place of destination, at the price they would have fetched there; but when at the port of lading, at the invoice price. (w) The practice is to make an account of the articles that are to contribute, in which the property sacrificed is included, otherwise its owners would receive its value without paying towards the loss. Another account is made of the losses to be replaced, the average is then commonly adjusted by the brokers, and paid by the insurers, of the different parties chargeable; and if there be any dispute, may be recovered either by action at law (x) or suit in equity. (y)

SECTION VI.—*Salvage.*

Salvage is defined to be a compensation to be made by the ship-owner or merchant, to other persons, by whose assistance the ship or its lading may be saved from impending peril, or recovered after actual loss. (z) It will be perceived from this that *salvage* may become due, either upon rescue from the perils of the sea, or from the hands of enemies.

When the rescue is from dangers of the sea, the salvor or rescuer has a lien on the goods preserved, and may keep them till a recompence has been made to him. (a) The

(v) 22 G. 3. c. 25. 43 G. 3. c. 160.
45 G. 3. c. 72.

(w) Abbott, part 3. c. 1.

(x) Birkley v. Presgrave, 1 East.
220. Dobson v. Wilson, 3 Camp. 480.

(y) Shepherd v. Wright, Shower, P.
C. 18.

(z) Abbott, part 3. c. 10.

(a) Hartford v. Jones, 1 Id. Raym.
393. Baring v. Day, 8 East. 57.

amount of this recompense, may, if the parties will not agree, be ascertained by a jury in an action brought by the salvor against the owner of the goods, or by the owner of the goods (having first tendered what he thinks sufficient) against the salvor. (b) If the salvage happen at sea, or between high and low water mark, (c) the Court of Admiralty has jurisdiction, and will, on suit brought, fix the amount of salvage to be paid and take care of the property, *pendente lite*.

Besides the common law and Admiralty jurisdictions, a tribunal for the summary adjustment of salvage in certain cases, is provided by several statutes; (d) by which all sheriffs, deputy-sheriffs, justices of the peace, mayors, bailiffs, and head officers of corporations, coroners, land-tax commissioners, constables, headboroughs, tithing-men, and officers of customs and excise, are armed with powers to gather men and demand assistance from vessels lying in the neighbourhood, in order to the preservation of any ship in distress; and a mode is chalked out for adjusting summarily their remuneration, and that of the rescuers in other cases of salvage, by the intervention of certain persons authorised to adjudicate in that behalf. These regulations do not apply to the Cinque Ports where a summary jurisdiction is, however, provided by stat. 1 & 2 Geo. 4. cap. 76.

With respect to *salvage* from enemies, the law formerly was that where a ship was taken and re-taken before the captor had conducted her *infra præsidia*; or at all events, before he had obtained a sentence of condemnation against her, the original owner had a right to her again on paying salvage to the re-captors. But if not re-taken till a later period, she was deemed to have become the absolute property of the captors, and consequently the lawful prize of the re-captors; the original owner's possibility of reinstatement

(b) Abb. P. 3. c. 10. s. 2.

c. 19. 48 G. 3. c. 130. ss. 21, 22. 49

(c) St. 1 & 2 G. 4. c. 75. s. 31.

G. 3. c. 122. 53 G. 3. c. 87. 1 & 2

(d) 12 Anne. st. 2. c. 18. 26 G. 2.

G. 4. c. 75 & 76.

being considered extinguished by the carriage *infra præsidia*, or sentence of condemnation. (e)

This rule was, however, altered by the legislature in favour of the original owner of the captured property, (f) who is now entitled to have it again on payment of salvage; no matter at what period the re-capture may have taken place: and the benefit of this alteration is extended to the allies of Great Britain, whose vessels have been captured by the enemy and re-captured by British ships, unless, indeed, it appear that those allies themselves act towards British property on a less liberal principle, for in that case, our courts adopt *their* rule, and mete to them according to their own measure of justice. (g)

The amount of salvage on re-capture, has at various times been variously regulated by statute. In 1793, it was fixed at *one-eighth* for the Royal Navy, and *one-sixth* for private ships. (h) Similar provisions were made during the last war, and the same rate of salvage is fixed for his Majesty's hired armed ships as for the Royal Navy. (i)

SECTION VII.—*Dissolution of Contracts of Affreightment.*

It remains only to add a few words upon the mode in which contracts of affreightment may be dissolved. Like all others, they may of course be rescinded, by the consent of parties, and are so, if rendered unlawful by a declaration of the government made before their performance: thus the breaking out of hostilities between the country to which the ship belongs and that to which she is bound, rescinds the contract of affreightment. It is not, however, dissolved by

(e) See case of *L'Actif*, 1 Edw. 185.

(h) 33 G. 3. c. 66.

(f) 13 G. 2. c. 4. s. 18. 17 G. 2. c. 34. s. 20. 29 G. 2. c. 34. s. 24.

(i) See stat. 43 G. 3. c. 16. ss. 39 & 41. Stat. 45 G. 3. c. 72. s. 7. Stat.

(g) *The Santa Cruz*, 1 Rob. A. R. 63.

48 G. 3. c. 132.

an embargo, which is but a temporary suspension, not a total interdiction of commerce; (k) unless, indeed, the embargo were intended as a hostile measure against the country to which the ship belongs, and the object of the voyage has been thereby lost. (l)

On the same principle, if the exportation of the articles of which the cargo is to consist be prohibited, the contract of affreightment is dissolved. (m) But such a prohibition by a foreign government is no excuse for the non-performance of an engagement to lade a vessel with a cargo of the goods whose exportation is prohibited; for one nation will not enforce the merely positive regulations of another, if inconsistent with its own. (n)

It is illegal, as contrary to the law of nations, to attempt to enter a blockaded port in violation of the blockade; and, after notification of such blockade, the act of sailing *with the intention* of violating the blockade, is illegal. (o) But the mere act of sailing to a port which is blockaded at the time the voyage is commenced, without any premeditated intention of breaking the blockade, if it shall be found to continue in force when the ship arrives off the port, is not illegal; (p) for it may be of the first importance to neutral merchants, to possess the opportunity of introducing their goods at the earliest moment after the blockade has been relaxed.

(k) Hadley v. Clarke, 8 T. R. 259.

3 B. & P. 295. n. a. et vide Sjoerds v.

(l) Touteng v. Hubbard, 3 B. & P. 291.

Luscombe, 16 East. 201.

(m) See Lord Ellenborough's remarks, in Barker v. Hodgson, 3 M. & S. 267.

(o) The Neptunus, 2 Rob. 110. Medeiros v. Hill, 8 Bingh. 234.

(n) Blight v. Page, Abb. P. 3. c. 11.

(p) Medeiros v. Hill, 8 Bingh. 234.

See Naylor v. Taylor, 9 B. & C. 718.

The Shepherdess, 5 Rob. 264.

CHAPTER IV.

MARITIME INSURANCE.

SECT. 1. *Definition and nature of the contract.*

2. *The parties, or who may be insurers and insured.*

3. *Subject matter, or what may be insured.*

4. *The policy.*

5. *Results of contract.*

6. *Proceedings on the contract.*

SECTION I.—*Definition and Nature of Contract.*

Insurance is a contract by which one party in consideration of a premium, undertakes to indemnify another party against a particular event.(a) A *Policy of Insurance* is the instrument in which this contract is set forth. The party who undertakes to indemnify is called the *Insurer*, and, having subscribed the policy, the *Under-writer*. The party indemnified is termed the *insured* or *assured*. The subject matter of insurance is very extensive, since any description of interest may be insured against any species of danger; save only where the contract would be opposed to the common law, or to some statute, ex. gr. 9 Ann. cap. 6. s. 57., which forbids insurances on marriages, births, christenings, and service; and 27 G. 3. cap. 1. against insurances on lottery tickets. The three principal species of insurance, which will alone be taken notice of in this Treatise are, 1. *Maritime Insurance*. 2. *Insurance upon Lives*. 3. *Insurance against loss by Fire*.

Maritime Insurance takes place when a merchant gives a premium to others to assure his ship or goods, from one port

(a) 2 Bl. Comm. 458. It has often occurred to me, that the insurance of titles to real property, might possibly be rendered a lucrative speculation; and

might furnish some protection against the danger arising from the want of a general registry.

or place to some other port or place, on such terms as they agree to. And if the ship, or goods, &c. perish, or are lost in whole, or in part, every subscriber is to make a recompense, either to the extent of his subscription, or *pro ratâ*, in proportion thereto. It is always considered a contract *uberimæ fidei*, and receives a liberal construction,^(b) for the benefit of trade, and of the assured. In considering it we will treat, 1. Of the parties to the contract, or who may be insurers and insured; 2. Of the subject matter of the contract, or what may be insured; 3. Of the policy or instrument in which the contract is set forth, its form and construction; 4. Of the results of the contract; and, 5. Of the proceedings consequent on those results.

SECTION II.—*The Parties to a Contract of Insurance.*

At common law any individual, partnership, or corporation, might have become *insurers*. By stat. 6 G. 1. cap. 18. the King was empowered to erect two chartered companies, viz. the Royal Exchange Assurance and London Assurance Companies, for insuring ships, and lending money on bottomry; and by the 12th section of that act, a monopoly was conferred upon them, as against all, excepting individual under-writers; of which, however, they have since been deprived, and the common law on this subject is restored, by stat. 5 G. 4. cap. 114.

Any persons, whether British or alien, may, generally speaking, be *insured*. No policy, however, can be effected, nor action maintained by or in behalf of an *alien enemy*, during war:^(c) unless, indeed, his ship be protected by the royal licence, in which case any person who effected the insurance as his trustee may sue.^(d) A neutral part-owner of goods,

(b) 2 Wms. Saund. 200. in notis.

(d) Kensington v. Inglis, 8 East. 373.

(c) Brandon v. Nesbitt, 6 T. R. 23.

recognized Flindt v. Waters, 15 East.

Bristow v. Towers, 6 T. R. 35. vide

266.

etiam Flindt v. Waters, 15 East. 260.

the residue of which belongs to one who, before the action, though subsequently to the loss, became an enemy, may sue on an insurance of his own share. (e)

An English subject living and trading *under the protection, and for the benefit*, of a foreign state, is looked on, if that state be hostile, as an enemy; if it be neutral, as a neutral. (f) But it does not appear to follow that, because a British or neutral merchant happens to be resident in an enemy's country, goods to be delivered for him at a neutral or friendly port, are on that account uninsurable; (g) nor does the military occupation of a country by our enemies, *ipso facto* constitute the natives of that country also enemies. (h)

Under the head of *Parties*, it seems proper to remark, that subscriptions to a policy are almost always procured by a *Broker*, concerning whom the practice is that the underwriters, to whom, in most instances, the insured are unknown, look to the broker for payment of the premium, and he to the insured. The latter pay the premiums to the broker only, and he is a middle-man between the insured and underwriter; but he is not solely an agent; he is a principal to receive the money from the insured, and pay it to the underwriter. (i)

SECTION III.—*The subject matter, or what may be insured.*

At common law, an interest on the part of the insured in the subject matter of insurance, was not absolutely requisite, and might have been dispensed with by a policy, containing the words *interest or no interest*; though in the absence of such words it was understood to exist, and must have been

(e) *Rotch v. Edie*, 6 T. R. 413. See Mr. Campbell's remarks on that case, *Bromley v. Hesseltine*, 1 Camp. 76. in notis.

(f) *M'Connell v. Hector*, 3 B. &

P. 113. *Willison v. Patteson*, 7 Taunt. 449.

(g) *Bromley v. Hesseltine*, 1 Camp. 75.

(h) *Hagedorn v. Bell*, 1 M. & S. 450.

(i) *Power v. Butcher*, 10 B. & C. 328.

proved. (k) However, by stat. 19 G. 3. c. 37. s. 1., it is enacted, "that no insurances shall be made by any persons, bodies corporate or politic, *on any ship belonging to his Majesty, or any of his subjects*; or any goods, merchandizes, or effects, laden, or to be laden on board such ships; interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer, and that every such insurance shall be void." A policy offending against the provisions of this section, is called a *Wager Policy*. By sect. 2., however, "insurances on private ships of war, fitted out by any of his Majesty's subjects, solely to cruize against his enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the insurer." By sect. 3. any effects from any port or places in Europe or America, in possession of the crowns of Spain or Portugal, may be insured in the same manner, as if this act had not been made.

It will be observed, that in consequence of the words printed in italics, foreign ships are not within this statute. (l) In ordinary cases, it is now requisite that the subject matter of insurance should be one in which the insured is *interested*, and of course it must be such as it is possible to have an interest in. Ships, (m) goods, a special property therein, *ex. gr.* that of a carrier, (n) or money expended by a captain for the ship's use, his commission and privileges, (o)

(k) See *Lucena v. Crawford*, 3 B. & P. 101. per Chambre J. and Sadlers C. v. Badcock, 2 Atk. 556. per L. Hardwicke, such an instrument was rather a *wager* than a *policy*, which is a contract to *indemnify*, and accordingly some wagers have been held prohibited by stat. 14 G. 3. c. 48. which aimed at similar policies on lives. *Paterson v. Powell*, 9 Bingham. 320.

(l) *Thelusson v. Fletcher*, Doug. 315. *Crawford v. Hunter*, 8 T. R. 13. *Nantes v. Thompson*, 2 East. 385.

(m) It seems doubtful whether a mortgagee of a ship can now insure the whole value. *Irving v. Richardson*, 2 B. & Ad. 194.

(n) *Park*. 14. *Crowley v. Cohen*, 3 B. & Adol. 485.

(o) *Gregory v. Christie*, *Park*. 14. *King v. Glover*, 2 N. R. 206.

expected profits, (*p*) bottomry, or respondentia interest, (*q*) freight, (*r*) have all been held fit subjects of Marine Insurance. Under the term *freight*, may be insured the benefit an owner would derive from carrying his own goods in his own vessel; (*s*) but in order to recover under a policy upon freight, the assured must prove, that but for the intervention of a peril insured against, some freight would have been earned, by shewing, either that some goods were put on board, or that there was some contract for doing so. (*t*) And if the cargo be so injured by a peril of the sea, that the master in the sound exercise of his discretion, leaves it behind, in consequence of which his owner loses freight, he cannot throw that loss upon the underwriter. (*u*) There are many other legal subjects of insurance; a defeasible or inchoate interest may be insured, as well as one absolute and perfect. (*w*) In a word, any person who has an *interest* in the subject matter of insurance, may be insured to the extent of that interest; and any person may be said to have an interest, who may be injured by the risks to which that subject matter is exposed, (*x*) or would only for them have a moral certainty of advantage.

The insurance of seamen's wages, or any thing to be received in lieu thereof, is illegal; for the maxim, that *freight is the mother of wages*, a maxim which tends to the public good, by stimulating mariners to exertion, would be evaded if the mariner could ensure the receipt of his wages at all events. (*y*)

(*p*) *Grant v. Parkinson*, Park. 402.
Eyre v. Glover, 16 East. 218. 3 Camp.
 276. *Barclay v. Cousins*, 2 East. 544.

(*q*) *Simonds v. Hodgson*, 3 B. &
 Ad. 52.

(*r*) *Montgomery v. Eggington*, 3 T.
 R. 362. *Taylor v. Wilson*, 15 East. 324.
 See *Barclay v. Stirling*, 5 M. & S. 6.

(*s*) *Flint v. Flemyng*, 1 B. & Ad. 49.

(*t*) *Flint v. Flemyng*, ubi. sup. *Horn-*
castle v. Stuart, 7 East. 400.

(*u*) *Mordy v. Jones*, 4 B. & C. 394.

(*w*) *Stirling v. Vaughan*, 11 East.
 619. 2 Camp. 225. *Le Cras v. Hughes*,
 Park. Insur. 406.

(*x*) *Lucena v. Crawford*, 2 N. R. 300.
 See *Stirling v. Vaughan*, ubi supra.
Hobbs v. Hannam, 3 Camp. 93. *Page*
v. Fry, 2 B. & P. 240. See the notes to
Goram v. Sweeting, 2 Wms. Saund. 202 e.

(*y*) See *Webster v. De Tastet*, 7
 T. R. 157.

Lord Ellenborough held at N. P., that an insurance on 300*l.*, lent to the captain, payable out of the freight, was illegal. (z)

The interest which an underwriter acquires, in the safety of that which he has insured, is not in this country a legal subject matter of insurance, except in three cases, viz. 1. The *insolvency*; 2. the *bankruptcy*; 3. the *death* of the insurer, in which a *re-assurance*, as it is termed, is allowed, but must be stated in the policy to be such, and must not exceed in amount the sum before insured. (a) This section of the act extends to foreign ships. (b)

It is scarcely needful to observe, that the subject matter of the insurance will be improper, and the policy unavailable, where a voyage insured is one prohibited by law; or goods insured were intended for carrying on an illegal commerce. (c) Trading with an enemy without the King's licence is illegal. (d) But such trade will be legalized by a royal licence; (e) the conditions of which must be strictly observed. Thus, if it require a bond as a preliminary to exportation, that bond must be given, or the exportation will be illegal. (f) So, if the licence be for a limited time: though if the adventure were *bonâ fide* prosecuted within the time, it will not become illegal so as to avoid a policy, because accidentally protracted beyond it. (g) A subject of Great Britain domiciled in a country in amity with ours, may exercise the privilege of a subject of that country, by trading with one in hostility to ours. (h)

An infirmity in any part of an integral voyage or policy

(z) *Wilson v. Royal Exchange Assurance Compy.* 2 Camp. 726.

(a) 19 G. 2. c. 37. s. 4.

(b) *Andree v. Fletcher*, 2 T. R. 161.

(c) *Camden v. Anderson*, 6 T. R. 723. 1 B. & P. 272. *Johnson v. Sutton*, Dougl. 254. *Delmada v. Motteux*, Park. 234.

(d) *Potts v. Bell*, 8 T. R. 548.

(e) *Vandyck v. Whitmore*, 1 East. 475. *Usparicha v. Noble*, 13 East. 332. See *Robinson v. Touray*, 1 M. & S. 217. *Robinson v. Cheeswright*, *ibid.* 220. *Hagedorn v. Reid*, 1 M. & S. 567. *Rucker v. Ansley*, 5 M. & S. 25.

(f) *Vandyck v. Whitmore*, *ubi supra*.

(g) *Schoeder v. Vaux*, 15 East. 52.

(h) *Bell v. Reid*, 1 M. & S. 726.

renders the whole illegal; (*i*) as, for instance, if a merchant insure legal and illegal goods together in the same policy: but if a ship bring hither from a hostile country some goods licensed and others not licensed, an insurance on the licensed goods will not be thereby vitiated. (*k*)

SECT. IV.—*The Policy—its Form and Construction.*

The policy, which is usually printed, with a few terms super-added in writing, as the intention of the parties happens to require, is an instrument of an extremely ancient form, and very inaccurate and ungrammatical in its language, which, however, having acquired a fixed meaning from judicial decisions, and the usage of trade, it is now safest to adhere to. (*l*) The words in writing, if there be a doubt upon the meaning of the whole, have greater effect attributed to them than those in print; because they are the immediate terms selected by the parties, whereas the others are a general formula. (*m*) Parol evidence is not admissible to controul the meaning of a policy, or indeed of any other written instrument: (*n*) though it is admissible, as in cases of other mercantile instruments, to explain the language of the policy, with reference to the usual practice of trade, *ex. gr.* to shew that the Gulf of Finland is considered by mercantile men part of the Baltic. (*o*) But the usage of Lloyd's being *primâ facie* only the usage of a single

(*i*) *Parkin v. Dick*, 2 Camp. 221. 11 East. 502. in *Wilson v. Marryat*, 8 T. R. 31.

(*k*) *Pieschall v. Alnutt*, 4 Taunt. 792. See 1 M. & S. 450.

(*l*) *Brough v. Whitmore*, 4 T. R. 208.

(*m*) 4 East. 136.

(*n*) *Aguilar v. Rogers*, 7 T. R. 423. *Yeats v. Pim*, 6 Taunt. 446. *Haines v.*

Knightley, Skinn. 54. *Weston v. Eames*, 1 Taunt. 115.

(*o*) *Udhe v. Walters*, 3 Camp. 16. accord. *Robertson v. Clarke*, 1 Bing. 445. *Moxon v. Atkins*, 3 Camp. 200. *Vallance v. Dewar*, 1 Camp. 503. *Lethulier's case*, 2 Sal. 443. *Noble v. Kennoway*, Doug. 510. *Charaud v. Angerstein*, Peake, 43. *Chapman v. Walton*, 10 Bing. 60.

house, will not be binding upon one who cannot be shewn to be acquainted with it. (p) And it has been thought that the practice of admitting usage to explain mercantile contracts, ought not to be extended. (q)

A policy is either *open* or *valued*. An *open policy* is where the value of the thing insured is not inserted in the policy; and, therefore, must be proved at the trial, if a loss happen. A *valued policy* is where the value of the thing insured is settled by agreement between the parties, and inserted in the policy, usually in this form:—"The said ship, &c. goods, and merchandize, &c. for so much as concerns the assureds by agreement between the assureds and assurers in this policy, are and shall be valued at £ . ." And sometimes the words, "the policy to be deemed sufficient proof of interest in case of loss," are added. Valued policies derive their origin from the difficulty the assured sometimes had in proving the value of his interest, which induced him to give the insurer a greater premium, to agree to estimate it at a certain sum, from which he derives this advantage, viz. that in case of a *total loss*, he is only bound to shew *some* interest, in order to satisfy the stat. 19 G. 2. cap. 37., but not *the value*, because that is admitted by the insurer. (r) However, *valued policies* must not be used as a cover for wagering; and therefore the interest of the assured must be a real *bonâ fide* interest, not a mere colourable one, otherwise the policy will be void; nay, if he fraudulently overvalue his interest, in order to cheat the insurers, he will not be permitted to recover even for what he actually had on board. (s)

The following is the ordinary form of a policy of insurance on ships and goods:—

(p) *Gabay v. Lloyd*, 3 B. & C. 793.

(q) *Anderson v. Pitcher*, 2 B. & P.

168. per Lord Eldon.

(r) *Lewis v. Rucker*, 2 Burr. 1171

Thelusson v. Fletcher, Doug. 315.

(s) *Haigh v. De la Court*, 3 Camp. 319.

See *Shaw v. Felton*, 2 East. 116.

of assureds. “*In the Name of God.* Amen.

A. B. as well in his own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance, and cause himself, and them, and every of them, to be insured, lost or not lost, at and from

Upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel, called the whereof is master, under God, for this present voyage, E. T. or whosoever else shall go for master in the same ship, or by whatsoever other name or names the same ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship, upon the said ship, &c.

and so shall continue and endure during her abode there, upon the said ship, &c. And further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandizes whatsoever, shall be arrived at

upon the said ship, &c. until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandizes, until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c. in this voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever,

without prejudice to this insurance. The said ship, and goods and merchandizes, &c. for so much as concerns the assureds, by agreement between the assureds and assurers in this policy, are and shall be valued at

Touching the adventures and perils which we the assurers are contented to bear, and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettizons, letters of mart and counter mart, surprisals, takings at sea, arrests, restraints, and detainments of all

kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have, or shall come to the hurt, detriment or damage, of the said goods and merchandizes, and ship, &c. or any part thereof. And in case of any loss or misfortune, it shall be lawful to the assureds, their factors, servants, and assigns, to sue, labour, and travel for, in and about the defence, safeguard, and recovery of the said goods, and merchandizes, and ship, &c. or any part thereof, without prejudice to this insurance; to the charges whereof, we the assurers will contribute each one according to the rate and quantity of his sum herein assured. And it is agreed by us the insurers, that this writing or policy of assurance, shall be of as much force and effect as the surest writing or policy of assurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elsewhere in *London*. And so we the assurers are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assureds, their executors, administrators and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured at and after the rate of

In Witness whereof, we the assurers have subscribed our names and sums assured in *London*."

"N. B. Corn, fish, salt, fruit, flour, and seed, are warranted free from average, unless general, or the ship be stranded.—Sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average, under 5*l. per cent.*—And all other goods, also the ship and freight, are warranted free from average, under 3*l. per cent.* unless general, or the ship be stranded."

The principal parts of the policy, are:—1. The name of the insured or his agent. 2. That of the ship. 3. The

subject matter of insurance. 4. The voyage insured. 5. The perils insured against. 6. The date and subscription. 7. The memorandum. 8. Stamp. 9. Warranties. Let us consider these in order: —

Name of Insured. (t)—By stat. 28 Geo. 3. cap. 56. It is enacted, that it shall not be lawful for any person to make or effect any policy of insurance, on any ship, goods, or other property, without first inserting the name or names, or usual style and firm of *one or more of the persons interested* in such insurance, or of the *consignor or consignors, consignee or consignees, of the property so insured*, or of the *person or persons residing in Great Britain, who shall receive the order for, and effect such policy*; or of the *person or persons who shall give the order to the agent* immediately employed to effect such policy. Policies are declared void if contrary to this statute, which must, it has been held, receive a liberal construction. (u)

2. *The name of Ship. (v)*—The ship ought to be truly described, for a variance from its right name might discharge the underwriter; it is, however, usual to insert in the policy, “or by whatever other name or names the same ship shall be called;” the effect of which is, to render a mistake in the name immaterial, if the identity of the ship can be proved,

(t) Usually inserted thus:—“A. B. (the insured) as well in his own name, as for and in the name and names of every other person or persons to whom the same doth, may, or shall appertain, doth make assurance, and cause himself and them and every of them to be insured, lost or not lost.”

(u) See *Woolf v. Horncastle*, 1 B. & P. 316. *Bell v. Gilson*, *ibid.* 345. & *De Vignier v. Swanson*, there cited. *Melish v. Bell*, 15 East. 4. *Hibbert v.*

Martin, 1 Camp. 538. *Dickson v. Lodge*, 1 Stark. 226. See *Bell v. Janson*, 1 M. & S. 201.

(v) Generally described as “the good ship or vessel called the —, whereof is master under God for this present voyage, E. F., or whosoever else shall go for master in the said ship, or by whatsoever name or names the same ship or the master thereof is, or shall be named or called.”

and the underwriter be not prejudiced by it. (*w*) A policy may also be effected upon *ship or ships* expected from any particular place. (*x*) The same observations apply to the name of the master, which is generally inserted along with that of the ship, with the addition of, "or whosoever else shall go for master in the said ship."

3. *The subject matter of Insurance.* (*y*)—The subject matter should be described with accuracy, (*z*) and evidence of usage is not admissible to contradict the plain meaning of such description. (*a*) A ship-owner may insure under the name of *freight*, the benefit he expects to derive from carrying his own goods in his own vessel; (*b*) so provisions are comprehended under the word *furniture*. (*c*) It is a sufficient description to say that a policy is upon *goods* generally; but that word will be intended to mean goods of ordinary, not extraordinary danger, such, for instance, as goods intended to be lashed on deck, (*d*) unless, indeed, they be goods which it is usual and proper to stow there: (*e*) for what is usually done by such a ship with such a cargo on such a voyage, is understood to be referred to by every policy, and to make a part of it, as much as if it were expressed therein. (*f*) An insurance may be effected upon *profits* gene-

(*w*) *Le Mesurier v. Vaughan*, 6 East. 382.

(*x*) *Kewley v. Ryan*, 2 H. B. 343.

(*y*) When the policy is on ship, described as—"the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called," &c. &c.

(*z*) *Glover v. Black*, 3 Burr. 1394. *Simonds v. Hodson*, 6 Bing. 120. reversed upon another point in 3. B. & Adol. 57.

(*a*) *Blackett v. Royal Exchange Assurance*, 2 Tyrwh. 275.

(*b*) *Flint v. Flemyng*, 1 B. & Ad. 49.

(*c*) *Brough v. Whitmore*, 4 T. R. 206.

As to the extent of this word, see *Blackett v. Royal Exchange Assurance*, 2 Tyrwh. 275.

(*d*) Judgment of Ld. Lyndhurst in *Blackett v. Royal Exchange Assurance*.

(*e*) *Da Costa v. Edmunds*, 4 Camp. 142.

(*f*) *Pelly v. Royal Exchange Assurance*, 1 Burr. 350. See *Noble v. Kennoway*, Doug. 510. and 2 Wms. Saund. 200. in notis.

rally. (g) But freight must be insured *eo nomine*, and is not covered by a policy on goods. (h) Although the *subject matter* of insurance must be properly described, *the nature of the interest* may be, generally speaking, left at large; in other words, though a policy must state correctly *what* is insured, it is not necessary that *the reason why* the party insures should also be expressed. (i)

It sometimes happens that the insurance is upon goods, "to be thereafter declared and valued, by ship or ships;" or in some form which leaves it to the insured to make a subsequent declaration of the goods intended. This *declaration of interest*, as it is called, is the mere exercise of a power conferred on the assured; it requires no assent on the part of the underwriters, though they generally sign their initials to it, not, however, for the purpose of expressing their assent, but for that of authentication. It is generally put upon the policy for convenience, but this is not necessary; neither is there any necessity for its being in writing. An error in it, made without fraud, may be corrected without the assent of the underwriter, and without a new stamp. (j) But though it does not require the underwriter's assent, it ought to be communicated to him. (k) else it would be in the power of the insured to destroy it, and substitute another in its place. If the words of the policy be large enough to cover an illegal adventure, and an illegal adventure was in fact intended by the insured, the policy is void, and the underwriter cannot sue for the premium. (l)

(g) Eyre v. Glover, 16 East. 218.
3 Camp. 276.

(h) Ballie v. Mondigliani, Park.
90.

(i) Crowley v. Cohen, 3 B. & Adol.
485.

(j) Robinson v. Touray, 3 Camp.
160.

(k) Harman v. Kingston, 3 Camp.
150.

(l) Jenkins v. Powers, 6 M. & S.
283.

4thly. *The Voyage.* (m)—The voyage also must be accurately described; (n) the description comprehending the times and places at which the risk is to begin and end. It is said that an omission of the *place* where the risk is to begin, would render the policy void for uncertainty; (o) but that an omission of the *time* would cause the risk to begin from the *making* of the policy. (p) The insertion of the words *at and from* the ship's loading port, has the effect of making the insurer answerable for any misfortune which may happen while the ship remains there, as if she be burnt or lost there, or detained by an embargo. (q) The insertion of these words, moreover, implies that the ship is either there at the time, or shortly will be there; (r) in default of which, the underwriter is discharged; and if she be not there when the policy is made, she must, in order that the risk may attach, arrive there in good physical safety. If she arrive at the outward port so shattered as to be a mere wreck, a policy on the homeward voyage never attaches. (s) I use the words good *physical* safety, because it is sufficient if

(m) Usually described as follows:—
 “A. B. &c. doth make assurance, &c. lost or not lost, at and from —, upon the body, &c. Beginning the adventure upon the said ship, &c., from and immediately following —, and so shall continue and endure until the said ship &c., shall be arrived at —, and there hath moored at anchor twenty-four hours in good safety; and it shall be lawful for the said ship in this voyage to proceed, and sail to, and touch and stay at any ports or places whatsoever, for any purposes whatsoever, particularly at C. and D., and forwards and backwards, and backwards and forwards, in any direction for the purposes of, &c.”

(n) *Robertson v. French*, 4 East. 130. *Langhorne v. Hardy*, 4 Taunt. 628. *Spitta v. Woodman*, 2 Taunt. 416.

(o) *Molloy*, 62. c. 7. Park, 28.

(p) *Ball v. Knight*, Fitz. 274. *Barnard*, 454.

(q) *Rotch v. Edie*, 6 T. R. 413. *Palmer v. Marshall*, 8 Bing. 79. *Williamson v. Innes*, there cited. See 2 Atk. 359. *Warre v. Miller*, 4 B. & C. 544.

(r) Per Ld. Ellenborough, *Hull v. Cooper*, 14 East. 475. *Mount v. Larkins*, 8 Bing. 123. and see *Freeman v. Taylor*, 8 Bing. 124.

(s) *Parmeter v. Cousins*, 2 Camp. 235.

she arrive safe in that sense, though from political causes, she may be in great danger of condemnation. (t) It is also implied that she shall sail thence as soon as she reasonably can, and therefore, if the insured mean to protect his vessel during a stay *in port*, he should use those words in the policy. (u) A policy *at and from* on freight, the ship being in a foreign port, means on the *homeward* freight, and will not cover a subsequent loss of the outward. (v) When the policy is *at and from* an island or district, the words in general protect the ship in sailing from one port to another in that island or district for the purpose of loading, at least, if the whole island or district be usually considered as one place. (w) A policy or goods *at and from* G. beginning the adventure from the loading on board the ship; does not protect goods laden before the ship's arrival at G., (x) unless there be something to indicate that a prior loading was contemplated; (y) as when the words used were "from the loading on board the ship wheresoever." (z) A voyage to A. B. and C. means a voyage to all or any of them, with this reserve, that if the ship go to more places than one, she must visit them in the order in which they are mentioned in the policy, (a) and must not split the voyage into two; *ex. gr.* by loading goods at A. and unloading them and loading others at B. (b) If a voyage be from or to a district containing several ports, they must, in

(t) Bell *v.* Bell, 2 Camp. 478.

(u) Palmer *v.* Fenning, 9 Bingham. 460. Palmer *v.* Marshall, 8 Bingham. 319. See Smith *v.* Surridge, 4 Esp. 25. Grant *v.* King, 4 Esp. 175. where the delay was held reasonable.

(v) Admitted Mackenzie *v.* Shedden, 2 Camp. 431. Bell *v.* Bell, *ibid.* 475.

(w) Camden *v.* Cowley, 1 Bla. 417. Bond *v.* Nutt, Cowp. 601. Forshaw *v.* Chabert, 3 B. & B. 158. Warre *v.* Miller, 4 B. & C. 538. Cruickshank *v.* Janson, 2 Taunt. 301.

(x) Langhorn *v.* Hardy, 4 Taunt. 628. Horneyer *v.* Lushington, 15 East. 46. Spitta *v.* Woodman, 2 Taunt. 416. 6 East. 188. Mellish *v.* Alnutt, 2 M. & S. 106. Rickman *v.* Carstairs, 2 Nev. & Mann. 571.

(y) Bell *v.* Hobson, 16 East. 240. Gladstone *v.* Clay, 1 M. & S. 418.

(z) Gladstone *v.* Clay. *ubi supra.*

(a) Marsden *v.* Reid, 3 East. 572.

(b) Sellar *v.* M'Vicar, 1 N. R. 23. Vide 5 B. & C. 201. 5 B. & A. 45.

the absence of provisions to the contrary, be visited in their geographical order. (c) But words are generally inserted to authorize deviations from the direct track, in order to the better accomplishment of the purposes of the voyage. (d) However, if the vessel sail upon a voyage different from that described in the policy, or having sailed on that described, afterwards deviate, the underwriters are released, (e) their risk in the former case never attaching, and in the latter being discharged upon a principle which we will explain when we come to speak of warranties. But a mere intention to deviate never carried into effect will not discharge them, (f) and if the ship be hindered from completing her voyage by a mere temporary impediment, she may, it would seem, lawfully wait at a neighbouring place of safety till it is removed, and afterwards pursue her voyage at the risk of the underwriter. (g) We have seen that the words *at and from* an island or district will generally protect the ship in sailing from one port of that island or district to another. But where she is insured *to* such an island or district, the risk as to the ship determines at the first port there at which she stops to unload: (h) the owner who wishes to avoid the effect of this rule, should insure the vessel to *her port or ports* of discharge. As to the goods, they will in general continue to be protected till their arrival at their port of delivery.

(c) *Clason v. Simmonds*, 6 T. R. 533.
See *Andrews v. Mellish*, 5 Taunt. 502.

(d) See *Leathly v. Hunter*, 7 Bing. 517. *Bottomley v. Bovil*, 5 B. & C. 210. *Bragg v. Anderson*, 4 Taunt. 328. *Wright v. Shiffner*, 11 East. 514. *Lambert v. Liddard*, 5 Taunt. 480.

(e) *Wooldridge v. Boydell*, Dougl. 16. *Way v. Modigliani*, 2 T. R. 30. *Bottomley v. Bovil*, 5 B. & C. 210. *Hogg v. Horner*, Park. 445. *Middlewood v. Blakes*, 7 T. R. 162. *Parkin v. Tunno*, 11 East. 22.

(f) *Kewley v. Ryan*, 2 H. Bl. 343. cited *Hare v. Travis*, 7 B. & C. 18. *Heselton v. Alnutt*, 1 M. & S. 46.

(g) See *Schroeder v. Thompson*, 7 Taunt. 462. *Blackenhagen v. L. A. Co.* 1 Camp. 454. *Hadley v. Clarke*, 8 T. R. 260. But see *Browne v. Vigne*, 12 East. 285. *Doyle v. Powell*, 4 B. & Ad. 272.

(h) *Camden v. Anderson*, 1 Bl. 417. *Leigh v. Mather*, 1 Esp. 413.

(i) *Leigh v. Mather*, 1 Esp. 413.

The voyage, as far as the underwriters' risk is concerned, is generally limited to determine when the ship has been moored "twenty-four hours *in good safety*." The words "*good safety*," are material; for instance, though she arrive in port, and remain there more than four-and-twenty hours, yet if she arrive a mere wreck, and afterwards founder, she cannot be said to have moored an instant in *good safety*, and the underwriter will not be discharged. (*k*) But it is otherwise, if having continued in safety twenty-four hours, she be afterwards lost, although in consequence of an act performed during the voyage, for instance, smuggling; (*l*) and if the words *good safety* be not used, the risk determines at the expiration of the limited time, whatever be the condition of the vessel. (*m*) But if the risk be "until the ship be discharged from her voyage," she is not considered discharged until the goods are unladen. (*n*)

The risk on goods is generally limited to continue until they shall be "*discharged and safely landed*." This landing must, however, be accomplished with reasonable expedition; delay would be in the nature of a deviation, and would discharge the underwriter. (*o*) But as the policy protects the goods till landed, the underwriter is liable, though the loss happen after a transshipment into shallops, lighters, droghers, or launches, such transshipment being in the usual course of the voyage, (*p*) which course, the underwriter is, as we have repeatedly observed, presumed to know. But it is otherwise, if the assured send his own lighter, and take the goods into his own

(*k*) Shawe v. Felton, 2 East. 109.
See Horneyer v. Lushington, 15 East. 46.
Maples v. Eames, 2 Str. 1243.

(*l*) Lockyer v. Offley, 1 T. R. 252.
Angerstein v. Bell, Park, 55.

(*m*) Meretony v. Dunlop, cited in
Lockyer v. Offley, 1 T. R. 260. See
Pole v. Fitzgerald, Willes, 641.

(*n*) Skinn. 243. Com. Dig. Merchant,
E. 9.

(*o*) Park, 470. See Leigh v. Mather,
1 Esp. 212. Noble v. Kennoway,
Dougl. 492.

(*p*) Stewart v. Bell, 5 B. & A. 238.
Matthie v. Polls, 3 B. & P. 23. Rucker
v. L. A. Co. 2 B. & P. 492. Tierney v.
Etherington, Burr. 348.

custody, or discharge the public lighterman who was employed. (q)

5th. *Perils*. — The perils against which the insurer guarantees, are described to be “Of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever; barratry of the master and mariners, and all other perils, losses, and misfortunes, that have or shall come to the hurt or detriment, or damage of the said —, or any part thereof.” The words *lost or not lost*, Gallicè, “*sur bonnes et mauvaises nouvelles*,” render the underwriter liable, though the ship be lost at the time of insurance; a circumstance, which but for those words, would avoid the policy. (r) It is sometimes the practice to restrain these words, by warranting the ship to be well on a particular day; yet, even then, if she were well on any part of that day, though she be lost before the policy is effected, the underwriter will be liable. (s) Indeed, if the insured knew at the time of making the insurance, that the ship was lost, that fraud avoids the policy. (t) Let us now examine the extent of the above words, and see what losses will be embraced by them.

Perils of the Sea. — These words mean, losses occasioned strictly by sea-damage, (u) *ex. gr.* by stress of weather, winds and waves, lightning and tempest, rocks, sands, &c. A loss occasioned by the ship insured being run down, is one

(q) *Sparrow v. Carruthers*, 2 Str. 1236. *Strong v. Natally*, 1 N. R. 19.

(r) *Jeffreyes v. Legendra*, 1 Show. 324. *E. of March v. Pigot*, 5 Burr. 2803.

(s) *Blackhurst v. Cockell*, 3 T. R. 363.

(t) *Jeffreyes v. Legendra*. *E. of March v. Pigot*, *ubi supra*.

(u) *Ex marinæ tempestatis discrimine*. *Emerigon*, vol. 1. c. 12. in initio. See 5 M. & S. 464. *Com. Dig. Merchant*, E. 9. *Shaw v. Felton*, 2 East. 109.

by perils of the sea ; (*w*) so is a loss, by her taking the ground on the uneven bed of a dry harbour, (*x*) or a loss of animals, killed by the agitation of the ship in a storm. (*y*) If a vessel be not heard of within a reasonable time after her sailing, it is presumed that she foundered, (*z*) and the assured may recover for a loss by *perils of the sea*. But if the ship be worm-eaten, (*a*) or rat-eaten, (*b*) or hove down on the beach within the tideway, to repair, and thereby bilged, (*c*) these are not losses by perils of the sea.

Fire.—How the fire was occasioned is immaterial, whether by a common accident, or lightning, or an act done in duty to the State. (*d*) But if goods be put on board in a damaged condition, and are in consequence liable to effervesce, and generate the fire by which they are consumed, the underwriters are not liable. (*e*)

Enemies.—This word is used in contradistinction to “*pirates, rovers, thieves*,” afterwards mentioned, a capture by whom, is an act of depredation ; whereas one by enemies, is an act done *jure belli*. (*f*) We have already had occasion to touch upon the change of property by capture, and to state that the mere fact of capture does not of itself divest an

(*w*) *Smith v. Scott*, 4 Taunt. 126. *Buller v. Fisher*, 3 Esp. 67. ; for winds and waves which drive the ships together are *causa causans*.

(*x*) *Fletcher v. Inglis*, 2 B. & A. 315. See *Hahn v. Corbett*, 2 Bingham. 205.

(*y*) *Lawrence v. Aberdeen*, 2 B. & A. 107.

(*z*) *Park*, 105, 6. *Green v. Brown*, Str. 1199. *Cohen v. Hinckley*, 2 Camp. 51. *Koster v. Innes*, R. & M. 333. See *Koster v. Reed*, 6 B. & C. 19. In such a case, if the ship re-appear, the underwriters may, it seems, take posses-

sion of her. *Houstman v. Thornton*, 1 Holt, 242.

(*a*) *Park*, 105. *Rohl v. Parr*, 1 Esp. 445.

(*b*) *Hunter v. Potts*, 4 Camp. 203.

(*c*) *Thompson v. Whitmore*, 3 Taunt. 227. See *Rowcroft v. Dunsmore*, *ibid.* 228. *Phillips v. Barber*, 5 B. & A. 161.

(*d*) *Gordon v. Rimington*, 1 Camp. 123. *Austin v. Drew*, 6 Taunt. 436. *Busk v. R. E. A. Co.* 2 B. & A. 73.

(*e*) *Boyd v. Dubois*, 3 Camp. 133.

(*f*) See *Matthie v. Potts*, 1 Bos. & P. 23.

owner's property in the thing captured. Insurance, however, being a contract of *indemnity*, the insured must be reimbursed, if he have in point of fact suffered a loss, and the underwriter cannot protect himself by any technical rules about the change of property. (g) If indeed the vessel be recaptured, and the owners become entitled to restitution on payment of salvage, that may under some circumstances change into a *partial* loss, one which was *primâ facie*, *total*. (h) But even when the vessel is preserved, the insured have a right to be indemnified against charges *bonâ fide* incurred in accomplishing that object; as where a neutral ship was improperly captured, an interlocutory decree pronounced against her, and the owners, dreading the expense and delay of appeal, compromised the suit, and purchased the captor's consent to a reversal. (i) An insurance against *British capture* is illegal, as being against public policy. (k)

Pirates, Rovers, and Thieves.—The meaning of the word pirate is explained in 4 Bl. Comm. 72. (l) Generally speaking, he is one who commits on the high seas those acts of robbery and depredation, which, if committed on land, would have been felonies.

Jettison.—Jettison is a throwing of goods overboard, *ex justâ causâ*, ex gr. to prevent their capture by an enemy. (m)

(g) *Goss v. Withers*, 2 Burr. 694. *Hamilton v. Mendes*, id. 1209. See *Milles v. Fletcher*, Dougl. 219. *Rotch v. Edie*, 6 T. R. 413. *M'Iver v. Henderson*, 4 M. & S. 576. *Cologan v. L. A. Co.* 5 M. & S. 447.

(h) *Hamilton v. Mendes*, 2 Burr. 1189. *Bainbridge v. Nelson*, 10 East. 328. *M'Masters v. Shoolbred*, 1 Esp. 237. *Patterson v. Ritchie*, 4 M. & S. 393. Vide post.

(i) *Berens v. Rucker*, 1 Bla. 313. See *Wilson v. Forster*, 6 Taunt. 25. 1 Marsh. 425.

(k) *Furtado v. Rogers*, 3 B. & P. 191. *Kellner v. Le Mesurier*, 4 East. 397. *Gamber v. Le Mesurier*, 4 East. 407.

(l) See also Com. Dig. Admiralty, E. 3. Hawk. B. 2. c. 38. s. 11. *Nesbitt v. Lushington*, 4 T. R. 788.

(m) *Butler v. Wildman*, 3 B. & A. 398.

Arrests, Restraints, and Detainments of Kings, Princes, and People.—By *kings* and *princes* are here meant all potentates whether at peace or war with us. (*n*) The term *people*, signifies the ruling power of a country whatever it may be, and will not include a crowd of riotous individuals. (*o*) One of the most usual species of detainments is an *embargo*, which is an arrest laid on ships or merchandise by public authority, or a prohibition of state, commonly issued to prevent foreign ships from putting to sea in time of war, and sometimes to exclude them from entering our ports.

As we have seen that the insured is not protected against British capture, so neither is a foreigner allowed to insure against British detention, (*p*) except so far as it may be accidental and erroneous. (*q*) Nor can a foreigner insure against the act of his own Government, (*r*) unless the underwriter agree to make such insurance with full knowledge (*s*) of the country of the insured; for a *foreigner*, insured against a loss of that description, might give such information to his own Government as would produce a seizure, the blow of which would fall upon the British underwriter. It seems, however, that a British subject might insure against British embargo. (*t*) If the detention be occasioned by the gross negligence (*u*) or improper conduct of the assured himself, *ex gr.* in carrying simulated papers without the underwriters' permission, he will not be permitted to recover; for his supineness or misconduct is a breach of his implied warranty to guard the assured

(*n*) Per Lord Mansfield, in *Goss v. Withers*, 2 Burr. 696. *Mellish v. Andrews*, 15 East. 13. *Sewell v. R. E. A. Co.* 4 Taunt. 856.

(*o*) *Nesbitt v. Lushington*, 4 T.R. 783.

(*p*) See *Touteng v. Hubbard*, 3 B. & P. 302.

(*q*) *Mullett v. Shedden*, 13 East. 304.

(*r*) *Campbell v. Innes*, 4 B. & A. 423. See *Conway v. Gray*, 10 East. 536.

(*s*) *Simeon v. Bazett*, 2 M. & S. 94. S. C. 5 Taunt. 824. 4 M. & S. 147.

(*t*) See Lord Alvanley's opinion, in *Touteng v. Hubbard*, 3 B. & P. 302. *Green v. Young*, 1 Ld. Raym. 840.

(*u*) *Pipon v. Cope*, 1 Camp. 434. See 2 Vern. 176. *Horneyer v. Lushington*, 3 Camp. 85. *Bell v. Carstairs*, 14 East. 90.

against all risks covered by the policy. (*w*) But a contravention of the mere revenue laws of a foreign country, consented to by the underwriter, will not vitiate; for our Courts do not take notice of them. (*x*) If the vessel be deterred from proceeding in her voyage through fear of an embargo; (*y*) or find the port of destination shut against her; (*z*) or be permitted to land her goods (which are afterwards seised) in the usual manner; (*a*) these losses are not within the policy; for in the former cases there was no seizure, in the last not until the voyage had determined. But the underwriter cannot protect himself by saying that the seizure was unjustifiable, or that the insured had a remedy over against the aggressors. (*b*)

Barratry by the Master and Mariners.—*Barratry* is derived from an Italian word, which signifies to cheat. In policies, it includes every species of fraud or knavery in the master or mariners of the ship, by which the owners are injured. (*c*) Thus, barratry may be committed by a wilful deviation in fraud of the owner, (*d*) by smuggling, (*e*) by running away with the ship, (*f*) by sinking or deserting her, or by defeating or delaying the voyage, with a criminal intent. (*g*) Even dropping an anchor, with a fraudulent intent, is barratry. (*h*) If by reason of these, or other similar acts, the subject matter of insurance

(*w*) 1 Camp. 436. note.

(*x*) *Planche v. Fletcher*, Dougl. 238. *Holman v. Johnson*, Cowp. 343. See *Simeon v. Bazett*, 2 M. & S. 94. 5 Taunt. 824.

(*y*) *Forster v. Christie*, 11 East. 205.

(*z*) *Hadkinson v. Robinson*, 3 B. & P. 388.

(*a*) *Brown v. Carstairs*, 3 Camp. 161. See *Carruthers v. Gray*, 15 East. 35. 3 Camp. 142.

(*b*) *Rotch v. Edie*, 6 T. R. 413. *Mullett v. Shedden*, 13 East. 304. *Wilson v. Forster*, 6 Taunt. 25.

(*c*) *Lockyer v. Offley*, 1 T. R. 252. *Knight v. Cambridge*, Str. 581, the first case on the subject. *Heyman v. Parish*, 2 Camp. 149.

(*d*) *Vallejo v. Wheeler*, Cowp. 143.

(*e*) See *Lockyer v. Offley*, ubi supra.

(*f*) *Hibbert v. Martin*, 1 Camp. 539. *Hucks v. Thornton*, 1 Holt, 30. *Toulmin v. Inglis*, 1 Camp. 411. *Toulmin v. Anderson*, 1 Taunt. 227.

(*g*) *Roscow v. Corson*, 8 Taunt. 684. Vide *Dixon v. Reid*, 5 B. & A. 597.

(*h*) Per Buller J. in *Ross v. Hunter*, 4 T. R. 38.

is detained, lost, or forfeited, the insured will be entitled to recover for a loss by *barratry*. However, to constitute an act of barratry there must be *fraud*, it must arise *ex maleficio*; a simple deviation, through ignorance, unaccompanied with fraud or crime, will not be barratry. (i) From the definition of barratry above given, it follows, that it can be committed by no one but the master and mariners, and against no one but the *owner* of the ship, (k) a term which, however, comprehends owners *pro hac vice*, ex gr. general freighters. (l) Of course, when the owner of the ship is also master, he cannot commit barratry against himself, (m) nor can an act performed with his consent be barratrous against him. (n) But barratry may be committed against the freighter, though with the consent of the general owner; (o) and it seems doubtful whether it may not against the owners, though with the consent of the freighter. (p) And though an act cannot be barratrous against the owner, if it be done with his consent, yet an act done *for his benefit*, if without his consent, may. Thus where the master having general instructions to make the best purchases with dispatch, went to an enemy's port and traded there, for which his ship was seized; this was held barratry, although his only object was to do the best for his employer. (q) For it is not for him to judge in cases not intrusted to his discretion, or to suppose that he is not breaking the trust reposed in him, but acting meritoriously, when he endeavours to advance the interest of his owners by means which the law for-

(i) Per Lee C. J. *Stamma v. Brown*, cited 7 T. R. 508. per L. Ellenborough. *Earle v. Rowcroft*, 8 East. 139. *Phyn v. R. E. A. C.* 7 T. R. 505. *Bottomley v. Bovill*, 5 B. & C. 212.

(k) *Nutt v. Bordieu*, 1 T. R. 323.

(l) *Vallejo v. Wheeler*, Cowp. 143. *Soares v. Thornton*, 6 Taunt. 627.

(m) *Ross v. Hunter*, 4 T. R. 33.

(n) *Stamma v. Brown*, Str. 1173. *Nutt v. Bordieu*, 1 T. R. 323.

(o) *Vallejo v. Wheeler*, Cowp. 143. *Soares v. Thornton*, 7 Taunt. 627.

(p) In *Hobbs v. Hannam*, 3 Camp. 94. Ld. Ellenborough held that it could not; but see *Boutflower v. Wilmer*, S. N. P. 963.

(q) *Earle v. Rowcroft*, 8 East. 126. See *Moss v. Byrom*, 6 T. R. 379.

bids, and which his owners must be taken also to have forbidden, both from their sense of public duty and their dread of risk. It is not necessary that the loss should be contemporaneous with the barratry; but it must happen during the voyage insured. Thus where the master during the voyage, committed barratry by smuggling, for which the ship was seized, but not till after she had moored twenty-four hours in safety at her destined port, the underwriter was discharged. (r)

Other Perils.—These general words are inserted, as Molloy remarks, to preclude all those nice questions formerly agitated by civilians and common lawyers; and may be useful where the loss, though one against which the assured ought to be indemnified, does not fall within any of the other classes specified in the policy. An instance of this may be found in *Cullen v. Butler*, (s) the first case in which the effect of these words came directly into question, where the crew of a British ship, believing the ship insured to be an enemy, fired upon and sunk her; this loss was held a loss by *other perils*; so where a ship, placed in a graving dock to be repaired, was, by the violence of the wind, thrown over on her side and bilged. (t)

The perils and losses mentioned in the policy, having been thus separately considered, there remain a few general observations upon this part of the contract. First, the underwriters are not liable for a loss which is necessarily incidental to the property, rather than occasioned by an adventitious cause, such as loss by worms, (u) or rats, (w) or the self-ignition of damaged hemp. (x) Secondly, there is a class of losses which seems not to fall within the contemplation of the policy; but only to entitle the loser to be reimbursed by the owner of the

(r) *Lockyer v. Offley*, 1 T. R. 251.

(s) 5 M. & S. 461.

(t) *Phillips v. Barber*, 5 B. & A. 161.

See *Butler v. Wildman*, 3 B. & A. 398.

(u) *Rohl v. Parr*, 1 Esp. 444.

(w) *Hunter v. Potts*, 4 Camp. 203.

(x) *Boyd v. Dubois*, 3 Camp. 133.

ship: (y) as for instance, where the captain is obliged to sell part of the goods for the repair of the ship. (z) Thirdly, in policies on freight, if the goods laden still exist, the underwriter is not liable, although the master sell or leave them behind on account of the great expense which would attend carrying them forward; for though he may in doing so have exercised a prudent discretion, yet it would be dangerous to allow him by any exercise of his discretion to cast the loss of freight from the shoulders of his owner, on those of the underwriter. (a) Fourthly, a loss is properly ascribed to a particular peril, if that peril be the *immediate* cause of the loss, though another cause may have contributed; as where a merchant vessel was taken in tow by a ship of war, and thus exposed to a tempestuous sea, (b) this loss was properly ascribed to perils of the sea; so where an enemy chases the ship and takes her, the loss is one by capture, though that enemy would not have overtaken her, had not her rate of sailing been checked by sea-damage. (c) In these and many other instances, (d) the maxim equally applies, *In jure causa proxima non remota spectatur*. Fifthly. When two causes contribute equally to the loss, it may be ascribed to either. Thus, if a ship be barratrously delivered to the enemy, the loss may be ascribed either to barratry, or capture: (e) as, in the case of *Hagedorn v. Whit-*

(y) See Judgment of Bayley J. and Abbott J. in *Powell v. Gudgeon*, 5 M. & S. 437.

(z) *Powell v. Gudgeon*. ubi sup. *Sarquy v. Hobson*, 2 B. & C. 7.

(a) *Mordy v. Jones*, 4 B. & C. 394.

(b) *Hagedorn v. Whitmore*, 1 Stark. 157.

(c) *Livie v. Janson*, 12 East. 653. per Ld. Ellenborough, *Green v. Emslie*, Peake, 212.

(d) Vide *Hahn v. Corbett*, 2 Bingh. 205. *Bondrett v. Hentigg*, Holt, 149. *Hayman v. Parish*, 2 Camp. 150. *Walker v. Maitland*, 5 B. & A. 171. *Hodgson v. Malcolm*, 2 N. R. 336. *Gordon v. Rimington*, 1 Camp. 123.

(e) *Arcangelo v. Thompson*, 2 Camp. 620. *Toulmin v. Anderson*, 1 Taunt. 227. 1 Holt, 30; and see *Butler v. Wildman*, 3 B. & A. 398.

more above cited, it probably might, to seizure and detention, as well as to the perils of the sea.

Date and Subscription.—The date and subscription, including a receipt for the premium, are inserted as follows: “And so we, the assurers, are contented, and do hereby promise and bind ourselves, each for his own part, our heirs, executors, and goods, to the insured, for the true performance of the promises; confessing ourselves paid the consideration due unto us for this assurance, by the assured, at and after the rate of ——. In witness whereof we, the assurers, have subscribed our names and sums assured in London.”

The insertion of the amount of premium is required by stat. 35 G. 3. cap. 63.: and the acknowledgment of his receipt herein contained, has been held conclusive between the assured and insurer in the absence of fraud. (*f*) The insertion of the amount insured is not required otherwise than by the stamp laws; (*g*) but is never omitted in practice; in conformity to which the underwriter also annexes the date to his subscription.

Memorandum.—The memorandum is inserted to protect the underwriter from liability to small averages, *i. e.* partial losses which might be claimed in respect of certain perishable commodities. It is as follows:—“N. B. Corn, (*h*) fish, salt, (*i*) fruit, flower, and seed, are warranted free from average, unless general, (*k*) or the ship be stranded. Sugar, tobacco, hemp,

(*f*) Dalzell *v.* Mair, 1 Camp. 532. See Foy *v.* Bell, 3 Taunt. 493. De Gaminde *v.* Pigou, 4 Taunt. 246. Mason *v.* Simeon, 3 Taunt. 497.

(*g*) 35 G. 3. c. 63. Dowell *v.* Moon, 4 Camp. 166.

(*h*) This word comprehends peas, Mason *v.* Skurray, Park. 179. and malt,

Moody *v.* Surridge, 2 Esp. 633. but not rice, Scott *v.* Bourdillon, 2 N. R. 213.

(*i*) This does not comprehend saltpetre. Journu *v.* Bourdieu, Park, 179, per Wilson, J.

(*k*) For an account of general average, see Chap. on Contracts of Affreightment, sect. 5.

flax, hides, and skins, are warranted free from average under five pounds per cent., and all other goods, also the ship and freight are warranted free from average under three pounds per cent., unless general, or the ship be stranded." This memorandum protects the underwriter from making good any partial loss whatever, upon the class of articles first specified, and any loss under five per cent. on the class secondly specified; *unless*, in either case, the loss were incurred in consequence of a general average, or the ship be stranded. The reason of the exception where the ship has been stranded, is, that in such a case the underwriters agree to ascribe the loss to the stranding, as being the most probable occasion of the damage, though the fact cannot be ascertained; and, accordingly, it is now clearly settled, that every average or partial loss becomes a charge upon the underwriters, where a stranding has taken place, whether the loss has been in reality occasioned by the stranding or no. (1) In consequence of this, the true sense of the word "stranding" has become a matter of importance. The rule laid down by Lord Tenterden in *Wells v. Hopwood*, and considered by him deducible from all the cases on the subject, is, "That where a vessel takes the ground, in the ordinary and usual course of navigation and management, in a tide-river, or harbour, upon the ebbing of the tide, or from natural deficiency of water, so that she may float again upon the flow of the tide, or increase of water, such an event is not to be considered a *stranding* within the sense of the memorandum. But where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event shall be considered a stranding within the meaning of the memorandum;" and his lordship was further of opinion that the fact of the vessel's not receiving injury from such a grounding was of no consequence. In the case just cited, the ship was moored in a tide-harbour against the quay, with her head fastened

(1) Per Lord Tenterden, in *Wells v. Hopwood*, 3 B. & Adol. 34.

to the opposite side of the harbour by a rope ; at the first ebb she took the mud, but at the second, the stretching of the rope, and a strong wind, caused her to ground upon a bank, where she was strained, and her seams opened, and received some water, whereby the cargo was damaged, but at high tide they closed again, and the vessel was ultimately uninjured. These circumstances were held by three Judges, Parke J. *dissentiente*, to constitute a stranding within the meaning of the policy. In *Kingsford v. Marshall*, (*m*) another recent case upon this subject ; the vessel on the ebbing of the tide took the ground *where it was intended that she should*, but in so doing, struck against some hard substance, which made two holes in her bottom, and damaged the cargo, this was held not to constitute such a stranding as would subject the underwriters to average ; and the Chief Justice in delivering judgment, mentioned the case of *Wells v. Hopwood*, and said it was decided on the principle that the taking the ground was occasioned by an *extraneous and accidental cause* ; but that in the case before him, the grounding was *such as the master and crew intended*, that is, merely by the ebbing of the tide in the ordinary course of navigation. These two instances will serve to show the reader how nice the distinction between what is, and what is not *a stranding*, has become. (*n*) To constitute *a stranding*, the ship must be stationary, the striking on a rock, where the vessel remains a minute and a half only, is not a stranding, though she thereby receives an injury, which eventually proves fatal. (*o*) It has been decided in a late case, that the underwriter is liable, if the aggregate of averages, however minute each average may be *per se*, come up to three per cent. upon the whole on property warranted free from average under three per cent., the Court, however, said that

(*m*) 8 Bingh. 458.

(*n*) See further *Bishop v. Pentland*, 7 B. & C. 219. *Hearne v. Edmunds*, 1 B. & B. 388. *Carruthers v. Syde-*

bottom, 4 M. & S. 77. *Rayner v. Godmond*, 5 B. & A. 225.

(*o*) *Mac Dougle v. R. E. A. Co.* 1 Stark. 130.

perhaps usage would be admissible to show that the contrary was intended, but there was no evidence of usage in the case before them. (*p*)

Stamp.—A policy of insurance must be duly stamped at the time when it is effected, it cannot be legally stamped afterwards. (*q*) But policies of mutual insurance, *i. e.* policies by which divers persons agree to insure one another, may be stamped with additional stamps, if not underwritten to an amount exceeding the sum warranted by the former stamps. (*r*)

By 35 G. 3. c. 63. s. 13. it is provided, "That the act shall not extend to prohibit the making of any alteration which may lawfully be made in the terms and conditions of any policy of insurance duly stamped, after the same shall have been underwritten, or to require any additional stamp duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, and so that the thing insured shall remain the property of the same persons, and so that such alteration shall not prolong the term insured beyond the period allowed by this act, and so that no additional or further sum shall be insured by means of such alteration." This clause receives a liberal interpretation. (*s*) A mere extension of the time of sailing is within it. (*t*) So is a memorandum waving the warranty of seaworthiness. (*u*) Where a policy "on ship and outfit," was altered by inserting "ship and goods," it was held, that the insured could not recover on the policy as altered, for want of a new stamp, (*w*) since the words, "*thing insured*," require one

(*p*) *Blackett v. R. E. A. Co.* 2 Tyrwh. 276.

(*q*) 35 G. 3. c. 63. *Roderick v. Hovil*, 3 Camp. 103.

(*r*) 9 G. 4. c. 49.

(*s*) Per Lord Tenterden, in *Brocklebank v. Sugrue*, post.

(*t*) *Kensington v. Inglis*, 1 East. 273. *Hubbard v. Jackson*, post.

(*u*) *Weir v. Aberdeen*, 2 B. & A. 325.

(*w*) *Hill v. Patten*, 8 East. 373, cited *Bathe v. Taylor*, 15 East. 415. *French v. Patten*, 9 East. 351, on the same policy, cited *Reed v. Deere*, 7 B. & C. 264.

identical and continued subject matter of insurance; nor on the policy as it before stood, by reason of the alteration; but when the alteration in the subject matter of insurance is to rectify a mere mistake, as where a broker instructed to effect a policy on goods, effected it on ship, no new stamp is necessary. (x) A memorandum, to a policy on "hemp, marked R., and valued, with warranty to sail before August 20:" withdrawing the mark of the hemp and warranty of sailing, in consideration of four guineas, does not render an additional stamp necessary; (y) nor does the alteration of a voyage "from Stockholm to Swinemunde," to one from Stockholm "to Swinemunde, Königsberg, or Memel;" (z) nor of a risk "at and from Liverpool to Quebec," to one "from Liverpool to St. John's New Brunswick." (a) But the terms of the original policy cannot be so altered by any memorandum, as to bring it into a class requiring a higher duty, without affixing the stamp thereby required. (b)

The rate of stamp duty payable on policies of marine insurance on voyages from any port or place in the united kingdom, or in Guernsey, Jersey, Alderney, Sark, or the Isle of Man, to any other port or place in the said kingdom, or islands, or Isle of Man; and also the rate of duty upon policies of mutual insurance is regulated by stat. 55 G. 3. c. 184. sch. part I. The rate of duty upon other policies is regulated by stat. 3 & 4 W. 4. ch. 23. sch.

Warranties.—We now pass to the consideration of *warranties*. "A warranty in a policy of insurance is a *condition* or contingency, and unless that be performed, there is not any contract; it is perfectly immaterial for what purpose it

(x) *Sawtell v. Loudon*, 5 Taunt. 359.
See *Robinson v. Touray*, 1 M. & S. 217.
Kershaw v. Cox, 3 Esp. 246.

(y) *Hubbard v. Jackson*, 4 Taunt. 169.

(z) *Ramstrom v. Bell*, 5 M. & S. 267.

(a) *Brocklebank v. Sugrue*, 1 B. & Adol. 81.

(b) Per Ld. Tenterden, in *Brocklebank v. Sugrue*.

was introduced ; but being inserted, the contract does not exist, unless it be *literally* complied with ;" (c) and in this necessity for a *literal* compliance, it differs from a *representation*, which it is sufficient to perform *substantially*. Warranties are either express, *i. e.* appearing in the body or margin, (d) or at the bottom, (e) of the policy, or in some writing, which is by reference incorporated with it ; (f) or implied, *i. e.* understood to exist in every policy unless expressly negatived. Any thing may, of course, be *expressly* warranted ; but those things which are most usually so, are,

1. The time of sailing.
2. The safety of the ship at a particular time.
3. That she shall depart with convoy.
4. That the property is neutral.
5. Freedom from seizure in port.

Let us consider these in order.

1. *Time of Sailing*.—When a ship is warranted *to sail* on a particular day, that means that she shall be *upon her voyage* on that day, for which purpose she must be completely unmoored ; it will not be sufficient that she had her cargo on board, and was only prevented from sailing by stress of weather. (g) But if she *bonâ fide* set sail for the purpose of completing her voyage, that will be enough, (h) although she be detained beyond the day at another part of the same territory, *ex. gr.* by an embargo. (i) It must, however, be observed, that a warranty to sail is not complied with, by a vessel's raising her anchor, getting under sail, and moving onwards, un-

(c) Per Ld. Mansfield C. J. 1 T. R. 345.

(d) Bean v. Stupart, Dougl. 11.
De Hahn v. Hartley, 1 T. R. 343.

(e) Blackhurst v. Cockell, 3 T. R. 360.

(f) Worsley v. Wood, 6 T. R. 710.
Routledge v. Burrell, 1 H. Bl. 254.

(g) Nelson v. Salvador, 1 M. & M. 309.

(h) Wright v. Shiffner, 11 East. 514.
2 Camp. 247. Lang v. Anderdon,
3 B. & C. 498.

(i) Bond v. Nutt, Cowp. 601. The-
lusson v. Fergusson, Dougl. 361.

less at the time of performing these acts, she has every thing ready for the performance of the voyage, and these acts are done as the commencement of it, nothing remaining to be done afterwards; (*k*) for instance, if she have not her clearances, or have not taken in her entire cargo, she cannot be said to have sailed, within the meaning of the warranty.

If the warranty be to *depart*, or “to sail *from* a place,” which seems to bear the same sense as *depart*, (*l*) it is necessary not only that the ship should *set sail on the voyage*, but also that she should be out of port on or before the day. (*m*) *To sail* is to set sail *on the voyage*; *to depart* is to depart *from some particular place*.

2. *Safety of a Ship on a particular day*.—We have already observed that a warranty of the safety of the ship on a particular day, is often inserted, in order to restrain the force of the expressions “*lost, or not lost*,” and have observed that if the ship be safe at *any time* in that day, the warranty is complied with. (*n*)

3. *To depart with convoy*.—This is a warranty usual in time of war, when a departure with convoy, is, from motives of public policy, in general, also enforced by statute. (*o*) A convoy is a naval force under the command of a person appointed by the government of the country to which the vessel insured belongs. The appointment by government is essential; for a ship of war accidentally bound on the same voyage with the vessel insured, is not a sufficient convoy. (*p*) But a convoy appointed by the admiral commanding in chief on a foreign station, is one appointed by government. (*q*) The terms of the

(*k*) Lang *v.* Anderdon, 3 B. & C. 498. Pittegrewe *v.* Pringle, 3 B. & Adol. 521.

(*l*) See Lang *v.* Anderdon, *ubi supra*.

(*m*) Moir *v.* R. E. A. 3 M. & S. 461. 6 Taunt. 245. and see the remarks of Abbott C. J. in Lang *v.* Anderden.

(*n*) Blackhurst *v.* Cockell, 3 T. R. 360.

(*o*) See st. 43 G. 3. c. 57. 38 G. 3. c. 76.

(*p*) Hibbert *v.* Pigou, Park, 498.

(*q*) Ibid. Vide Audley *v.* Duff, 2 B. & P. 111.

warranty are, sometimes to depart *with convoy*, at other times, with *convoy for the voyage*. These two forms of expression mean precisely the same, and render a departure with *convoy for the voyage* necessary. (r) But as it sometimes happens that government appoints a convoy to accompany the ships for part only of their voyage, and then to be succeeded by another, or to detach a portion of itself from the main body, to bring them up to a particular point; the warranty will be complied with if the vessel sail with the first convoy, and proceed with the force so appointed, or detached. (s) Indeed, as government alone can appoint convoys, the question whether a convoy be or be not sufficient, must to a great extent depend upon its orders. (t) It may be impossible to procure a convoy either precisely from the port of departure, or precisely to that of destination; (u) for instance, no convoy ever sails from the port of London. (v) In such cases the rule is, that if the vessel sail with convoy *from* the place of rendezvous appointed for vessels bound from her lading port, and *to* the nearest point to which she can be conducted by the convoy appointed for vessels going to her place of destination, that is sufficient. A warranty to depart with convoy is not complied with unless the master, if by due diligence he can, obtain sailing instructions before the ship leaves the place of rendezvous, for the value of convoy, in a great measure arises from its taking the ships under controul, as well as protection: but that controul cannot commence till sailing instructions have been obtained, nor can it be enforced, otherwise than by their means. (w)

(r) Jeffrey v. Legendra, 3 Lev. 321.
Lilly v. Ewer, Dougl. 72.

(s) Abbott, 229. Smith v. Redshaw, Park, 510. De Garay v. Claggett, ib. 511. Manning v. Gist, Marsh. 269. Audley v. Duff, 2 B. & P. 111.

(t) See remarks of Heath J. Audley v. Duff, ubi supra.

(u) D'Eguino v. Bewicke, 2 H. Bl. 551. Lethulier's case, Sal. 443. Gordon v. Morley, Str. 1265.

(v) Abbott, 227.

(w) See Anderson v. Pitcher, 2 B. & P. 169. Webb v. Thompson, 1 B. & P. 5.

Moreover the meaning of the warranty is that the ship shall not only *depart* with convoy, but *keep with it*, during the whole voyage, except in cases of absolute impossibility, such as being driven by a tempest to some foreign port, where no convoy can be had. (x)

4. *Neutral Property*.—In war-time it is also usual to warrant the subject of insurance to be *neutral property*, which only means that it is *neutral* at the commencement of the risk, not that it shall continue so during the rest of the voyage. (y) Indeed, if the ship forfeit her neutrality by the misconduct of those on board, the warranty will have been broken *as to her*; (z) for when a ship is warranted *neutral*, that means, first, that she shall belong to the subject of a neutral state; and secondly, that she shall be navigated according to the law of nations, and the particular treaties, subsisting between the country to which she belongs and the belligerents: and, therefore, if by such a treaty it have been agreed, that those ships only shall be considered neutral which are furnished with particular documents, whoever warrants her neutrality must take care that she have those documents on board: (a) but it is not necessary that she should be navigated in conformity to the *ex parte* ordinance of one of the belligerents in which her own nation has not concurred. (b) The sentence of a foreign Court of Admiralty, or other court having jurisdiction over questions of prize, and adjudging the vessel to be good prize, on a ground within their jurisdiction, will, *if such ground falsify the war-*

(x) *Jeffrey v. Legendra*, 3 Lev. 320. Carth. 216. Sal. 443. 1 Shower, 320. 4 Mod. 58.

(y) *Eden v. Parkinson*, Dougl. 732. *Tyson v. Gurney*, 3 T. R. 477.

(z) *Garrels v. Kensington*, 8 T. R. 230. See *Carruthers v. Gray*, 3 Camp. 142. 15 East. 35, as to goods.

(a) *Rich v. Parker*, 7 T. R. 705. *Baring v. Christie*, 5 East. 398. *Collectanea Juridica*, vol. 1. p. 33.

(b) *Pollard v. Bell*, 8 T. R. 434. *Bird v. Appleton*, 8 T. R. 562. *Price v. Bell*, 1 East. 663. *Collectanea Juridica*. vol. 1. p. 33.

warranty, (c) be conclusive evidence that it has been broken ; and that though it appear on the face of such sentence, that the court arrived at its conclusion through rules of evidence established by particular ordinances of its own country, and inadmissible on general principles. (d) But if the ground of condemnation be stated obscurely, (e) or the sentence adjudge the ship prize, not because she was enemy's property, but for reasons leading to a contrary conclusion ; (f) or if it appear that it was founded solely on the violation of an *ex parte* ordinance to which the neutral state had not assented ; (g) in such cases the sentence is not conclusive evidence of a breach of the warranty.

5. *Freedom from Seizure in Port of Discharge*.—A clause is sometimes inserted to exempt the underwriters from responsibility in case of *confiscation*, *seizure*, or *capture* in port. The principal difficulties which arise on it, respect the question, when is a seizure, properly speaking, *in port*. These cases will greatly depend upon their own peculiar circumstances. A disposition has been evinced to hold the word port to include any place where the vessel was intended to be discharged ; (h) but if a vessel, when seized, be neither within the *caput portus*, nor within that part of the haven where ships usually unload, the underwriter is not discharged by this warranty. (i) Whether

(c) *Baring v. Claggett*, 3 B. & P. 201. *Lothian v. Henderson*, 3 B. & P. 449. *Bolton v. Gladstone*, 5 East. 155. *Siffken v. Lee*, 2 N. Rep. 489. *Garrels v. Kensington*, 8 T. R. 230.

(d) *Bolton v. Gladstone*, 2 Taunt. 85. *Baring v. R. E. A. Co.* 5 East. 99. *Geyer v. Aguilar*, 7 T. R. 681.

(e) *Bernardi v. Motteux*, Dougl. 574. *Fisher v. Ogle*, 1 Camp. 418. *Dalgleish v. Hodgson*, 7 Bingh. 504.

(f) *Calvert v. Bovil*, 7 T. R. 523. *Dalgleish v. Hodgson*, *ubi supra*.

(g) *Bird v. Appleton*, 8 T. R. 562.

(h) *Jarman v. Coape*, 2 Camp. 613. 13 East. 394. *Dalgleish v. Brooke*, 15 East. 295, which seems at variance with *Browne v. Tierney*, 1 Taunt. 517. *Maydhew v. Scott*, 3 Camp. 205. *Oom v. Taylor*, *ibid.* 204. See *Cockey v. Atkinson*, 2 B. & A. 460.

(i) *Keyser v. Scott*, 4 Taunt. 660. *Levy v. Vaughan*, 4 Taunt. 387. *Melish v. Hanneforth*, 3 Taunt. 499.

the vessel was at her port of discharge or not, is a question entirely for the jury. (k) It has been ruled, that where this warranty is inserted, the underwriters are discharged, if the insured deviate from the usual course of the voyage in order to avoid the excepted peril. (l) This doctrine appears hard on the insured, who, if there were no warranty, would be entitled to recover. (m)

Implied Warranties.—The implied warranties are,

1. Not to deviate.
2. Seaworthiness.
3. That the insured will use reasonable diligence to guard against the risks covered by the policy. (n)

1. *Not to deviate.*—A deviation from the proper course and track of the voyage insured, (o) discharges the underwriter, not *ab initio*, but *from the time of the deviation*; so that he is liable for any damage which had previously accrued, (p) but is freed from subsequent responsibility. A deviation happens, where there is a wilful and unnecessary departure from the due course of the voyage, for any, even the shortest time. Thus if the master touch at a port for a purpose unconnected with the voyage, (q) or at a port not in the course of the voyage, though only a few leagues out of the way; (r) or one at which it is not usual to touch, although the ship must pass it; (s) or stay an unusual time; (t) or if, when there are several tracks,

(k) *Keyser v. Scott*, 4 Taunt. 660.
Reyner v. Pearson, 4 Taunt. 662. *Levin v. Newnham*, 4 Taunt. 722.

(l) *O'Reilly v. R. E. A.* 4 Camp. 246.

(m) *O'Reilly v. Gonne*, 4 Camp. 249.

(n) See *Pipon v. Cope*, 1 Camp. 434, and the editor's note, *Law v. Hollingworth*, 7 T. R. 160. *Bell v. Carstairs*, 14 East. 384, see post, p. 236. n.

(o) As to this see ante, p. 209. et seq.

(p) *Green v. Young*, 2 Raym. 840. Sal. 444.

(q) *Hammond v. Reid*, 4 B. & A. 72. *Solly v. Whitmore*, 5 B. & A. 45.

(r) *Hibbert v. Phyn*, 4 Camp. 150.

(s) *Fox v. Black*, Bea. 315. *Townson v. Gwyon*, id. *ibid.* *Salisbury v. Townson*, Park, 454.

(t) *Williams v. Shee*, 3 Camp. 469. *Redman v. London*, 3 Camp. 503.

he select one in particular, for a purpose foreign to the voyage, instead of that which is safest and most eligible; (*u*) or having liberty to touch at one port, touch at another; (*w*) or touch at the port mentioned in his liberty, but for an unauthorised purpose; (*x*) all these are deviations; and, though there is no objection to a policy on part of a voyage, (*y*) yet, if a policy be on the whole voyage, a deviation, which happened even before the making of the policy, will be fatal. (*z*) In determining whether there have been a deviation, regard is always to be paid to the object of the voyage, and the usage of trade with respect to such voyages. (*a*) Thus if it be usual to stop long at a port, or to go out of the way, the underwriter is considered as understanding that usage. (*b*) But, as has been frequently observed, no usage can be set up against the express language of a policy; and the policy often, in express terms, grants liberty to the insured to perform acts which, only for that liberty, would amount to deviations; (*c*) but care must be taken not to exceed the liberty: and even an express liberty is construed with reference to the main object of the voyage. Thus under a liberty to touch and stay at any port or ports whatever, the stay must be for some purpose connected with the furtherance of the adventure. (*d*) Where a ship was insured from Lisbon to England, with liberty to call at any one

(*u*) *Middlewood v. Blakes*, 7 T. R. 162.

(*w*) *Elliot v. Wilson*, 7 Bro. P. C. 459. 4 Bro. P. C. 470. Tomlins, ed.

(*x*) *Bottomley v. Bovill*, 5 B. & C. 219. *Langhorn v. Alnutt*, 4 Taunt. 511. See *Inglis v. Vaux*, 3 Camp. 437.

(*y*) *Taylor v. Wilson*, 15 East. 324. *Driscoll v. Pasmore*, 1 B. & P. 200.

(*z*) *Redman v. Loudon*, 3 Camp. 303. *Robertson v. Marjoribanks*, 2 Stark. 573.

(*a*) *Comyns Dig. Merchant*, E. 9.

Stewart v. Bell, 5 B. & A. 238. *Delany v. Stoddart*, 1 T. R. 26. *Salvador v. Hopkins*, 3 Burr. 1707.

(*b*) *Bond v. Gonsales*, 2 Salk. 445, cited 1 Burr. 348.

(*c*) Vide *Barclay v. Stirling*, 5 M. & S. 6. *Leathly v. Hunter*, 1 Tyrwh. 359. S. C. 7 Bingham. 517. *Mellish v. Andrews*, 6 East. 312. 2 M. & S. 27. 5 Taunt. 496.

(*d*) *Langhorn v. Allnutt*, 4 Taunt. 511. See *Jarratt v. Ward*, 1 Camp. 263. *Williams v. Shee*, 3 Camp. 469. 504. *Bottomley v. Bovill*, 5 B. & C. 210.

port in Portugal, it was held that this must mean some port in the course of the voyage to England ; (e) and as we have seen that a voyage to A. B. and C. means a voyage to them in the order mentioned in the policy, so where liberty is given to touch at several specified ports, they must, if more than one be visited, be taken in the order named in the policy. (f) Nor must the stay at any of them be unreasonable ; (g) but when a ship has liberty to touch at a port, she has also liberty to trade there, provided that no extra delay be thereby occasioned. (h) If the vessel, in time of war, cruise for a prize, (i) that is a deviation, unless she have express liberty to do so. A liberty to chase is different from one to cruize for prizes ; and a liberty to chase, capture, and man, will not justify a lying in wait nine days for a prize, (k) nor a delay for the purpose of bringing her, when captured, into port, in order to that, there should be a liberty to convoy prizes. (l) A liberty to cruize for six weeks, means, for six weeks successively. (m)

An unreasonable delay in sailing to the port or place at which the risk is to commence, is in the nature of a deviation, and discharges the underwriter. (o)

But the policy will not be avoided by a mere intention to deviate, never carried into effect, (p) and there are circumstances under which an actual deviation will be excused ; these are where the deviation is occasioned, by necessity, or some

(e) *Hogg v. Horner*, Marsh. 197, but see for qualifications of this doctrine, *Metcalfe v. Parry*, 4 Camp. 123. *Bragg v. Anderson*, 4 Taunt. 229.

(f) *Gardner v. Senhouse*, 3 Taunt. 16. Vide ante p. 210.

(g) *Williams v. Shee*, 3 Camp. 469. 504.

(h) *Raine v. Bell*, 9 East. 195, *Laroché v. Oswin*, 12 Est. 131.

(i) *Cock v. Townsend*, Beawes, 316. Park, 448. See *Phelps v. Auldjo*,

2 Camp. 350. *Jolly v. Walker*, Beawes, 316. *Parr v. Anderson*, 6 East. 202.

(k) *Hibbert v. Halliday*, 2 Taunt. 428.

(l) *Lawrence v. Sydebotham*, 6 East. 45.

(m) *Syers v. Briggs*, Dougl. 509.

(o) *Mount v. Larkin*, 8 Bingh. 109. *Palmer v. Marshall*, 8 Bingh. 82. See *Freeman v. Taylor*, 8 Bingh. 138.

(p) *Kewley v. Ryan*, 2 H. Bl. 343. *Foster v. Wilmer*, 2 Str. 1249. *Heselton v. Alnutt*, 1 M. & S. 46. See *Hare v. Travis*, 7 B. & C. 18.

imperative obligation, *ex. gr.* to take in provisions to save the crew from starving, or procure repairs for the safety of the ship; for there is a liberty implied in every policy to do that which is necessary for the preservation of the vessel, and the lives of those on board her. (q) The ordinary occasions by which a deviation is justified, are,

1st. *To join convoy*, for it may be a measure of necessary prudence; and a captain, unless expressly prohibited, may always do when insured what it would be necessary to do if uninsured. (r) 2dly. *Stress of weather*; (s) or, 3dly. *Want of repairs*. (t) 4thly. *The approach of an enemy*. (u) 5thly. *Succouring distress*. (w) 6thly. *Mutiny, desertion, sickness of the crew*, or any other inevitable accident; (x) for instance, when the vessel was carried out of her course by a King's ship. (y) But though necessity will justify a deviation, yet it is plain, on principles of common sense as well as law, that such necessity must not have been occasioned by the insured's own fault, (z) and that the voyage of necessity must be pursued in the shortest and most expeditious manner. (a)

2. *Sea-worthiness*.—It is a condition implied in every policy, that the ship shall be sea-worthy *when the voyage commences*; (b)

(q) Vide *Urquhart v. Barnard*, 1 Taunt. 450. *Lavabre v. Wilson*, Dougl. 284. *Warwick v. Scott*, 4 Camp. 62. *Woolf v. Claggett*, 3 Esp. 258.

(r) *D'Aguilar v. Tobin*, 1 Holt. 185. See *Warwick v. Scott*, 4 Camp. 62.

(s) *Delany v. Stoddart*, 1 T. R. 22. *Smith v. M'Neil*, 2 Dow. 538. 544.

(t) *Motteux v. L. A. Co.* 1 Atk. 547. See *O'Reilly v. Gonne*, 4 Camp. 249.

(u) *O'Reilly v. Gonne*, *ubi supra*.

(w) Per Lawrence J. 6 East. 54.

(x) *Driscoll v. Bovill*, 1 B. & P. 313. *Driscoll v. Pasmore*, 1 B. & P. 201.

Elton v. Brogden, 2 Str. 1264. See

(y) *Scott v. Thompson*, 1 N. R. 181.

(z) *Phelps v. Auldjo*, 2 Camp. 350. *Forshaw v. Chabert*, 3 B. & B. 158.

Woolf v. Claggett, 3 Esp. 258.

(a) *Lavabre v. Wilson*, Dougl. 277.

(b) See *Watts v. Morris*, 1 Dow. 32. *Douglas v. Scougall*, 4 Dow. 269.

Wilkie v. Geddes, 3 Dow. 57. *Rich v. Parker*, 7 T. R. 709. *Shore v. Bentall*,

7 B. & C. 798. *Wedderburne v. Bell*, 1 Camp. 1.

this condition does not attach till her sailing, and therefore if she be insured at and from a port, she is protected while in the port, though in want of repairs. (c) The rule of law is, that the assured is bound to have the ship sea-worthy at the commencement of the voyage. He is bound, therefore, to have her properly equipped with sails (d) and anchors, (e) with a sufficient crew, (f) and a master of competent skill and ability to navigate her when she sails at the commencement of the voyage, and if she sail for a port where there is an establishment of pilots, and the nature of the navigation requires one, the master must take a pilot on board. (g) So if in the course of her voyage the master arrive in a port or place where a pilot is necessary, and take one on board, he ought not to dismiss him before the necessity has ceased; but if a vessel sails to a port where the establishment is such, that it is not always possible to procure the assistance of a pilot before the vessel enters on the difficult part of the navigation, then, as the law compels no one to perform impossibilities, all that can be requisite is, that the master use all reasonable efforts to obtain one. (h) *Sea-worthiness* is a term which always refers to the service in which the ship is engaged; therefore, a vessel may be sea-worthy if designed for one service, which would not be so if designed for another. (i) Although the general rule is, that if the ship be not sea-worthy at the commencement of the voyage, the policy will be avoided; yet there appears to be an exception in cases where the unsea-worthiness results from a mistake or accident, which is remedied as soon as

(c) *Annen v. Woodman*, 3 Taunt. 299.

(d) *Wedderburne v. Bell*, 1 Camp. 1.

(e) *Wilkie v. Geddes*, 3 Dow. 57.

(f) *Shore v. Bentall*, 7 B. & C. 798 n. *Forshaw v. Chabert*, 3 B. & B. 158.

(g) The provisions of the legislature respecting pilots are so minute that it is

considered better to refer the reader to *Abbott on Shipping*, for a full account of them, than to attempt any abridgment. See 6 G. 4. c. 126. s. 56.

(h) *Phillips v. Headlam*, 2 B. & Adol. 384. See *Law v. Hollingworth*, 7 T. R. 160.

(i) *Hucks v. Thornton*, 1 Holt. 30.

it is discovered, and before any loss has been occasioned by it. (k)

3. The insured impliedly warrants that he will guard with reasonable diligence against the risks covered by the policy, so that a loss shall not happen through his own default and negligence: (l) thus he must take care in case of a policy on ship, that she be documented according to her national character, for every ship must have some national character, and the underwriters will not be liable, if a loss happen from the default of the insured, in being unprovided with those documents which are required by the general law of nations, or by particular treaties: (m) thus, as the carrying simulated papers is an offence against the law of nations, if a ship carry them, *and* is condemned on that ground, the *warranty of documentation* is infringed, and the underwriters are not liable; (n) but as in the case of express warranty of neutral property, so in the cases now under consideration, disobedience to the mere *exparte* ordinance of a foreign state, does not vitiate the policy. (o) There is this difference between an *express* warranty of the ship's national character, and that which we are now considering, viz. that in the case of an *express* warranty, if the ship be not properly documented at the time of sailing the underwriters are discharged: (p) whereas a breach of the implied warranty does not discharge the underwriter, unless a loss actually happen in consequence. (q)

(k) Weir v. Aberdeen, 2 B. & A. 320.

(l) Pison v. Cope, 1 Camp. 434. et notam. Law v. Hollingworth, 7 T. R. 160. Bell v. Carstairs, 14 East. 384.

(m) Bell v. Carstairs, 14 East. 384. See Nonnen v. Kettlewell, 16 East. 186.

(n) Oswell v. Vigne, 15 East. 70. Flindt v. Scott, 5 Taunt. 692.

(o) Nonnen v. Reid, 16 East. 176. See Le Cheminant v. Pearson, 4 Taunt. 367. Sewell v. R. E. A. Co. 4 Taunt. 859.

(p) Rich v. Parker, 7 T. R. 705.

(q) See Bell v. Carstairs, 14 East. 385. per Ld. Ellenborough, and Price v. Bell, 1 East. 663. It has been sometimes said, as in Bell v. Carstairs, *ubi supra*, that there was *no warranty of documentation*, but that I think, can only be understood to mean *no express* warranty; for it seems clear that the cases support the opinion in Mr. Campbell's notes to Pison v. Cope, 1 Camp. 434, that the insured impliedly warrants to

The obligation to have the ship properly documented may be waived, as for instance, by a liberty to carry simulated papers. (r) Nor is any warranty of documentation implied in an insurance upon goods, (s) unless they belong to the owner of the ship, for then there is. (t)

SECTION IV.—*Results of Contract.*

Having now finished our consideration of the form and construction of the contract, we proceed to inquire respecting its result: this will of course be either the safety or loss of the thing insured. In case of its safety, little matter for discussion arises. In case of *loss* by any of the perils insured against, the first consideration is, whether the loss be a *total* or a *partial* one; for as insurance is a contract of indemnity, the insured, if he have suffered only a partial loss, will be entitled only to a partial payment from the insurer. We will therefore now inquire respecting the distinction between these two classes of loss, and what is properly speaking a *total loss*, what only a *partial one*.

Total Loss.—A total loss is of two sorts: it is either *total per se*, or such as may be rendered total by *abandonment*, which is a relinquishment of whatever may be saved to the insurer. The object of an abandonment is to prevent the insured from reaping an undue benefit from the policy, which is a contract of

guard the insurer with reasonable diligence against the risks insured; and that if a loss happen in consequence of insufficient documentation, that implied warranty will be broken, and the breach a defence. Perhaps the nature of the implied warranty under which these cases fall, would be more correctly expressed by saying that the insured war-

rants that a loss shall not happen through his own default.

(r) *Bell v. Bromfield*, 15 East. 364.
Simeon v. Barrett, 2 M. & S. 94.

(s) *Dowson v. Atty*, 7 East. 367.
Carruthers v. Gray, 15 East. 35.
3 Camp. 142.

(t) *Bell v. Carstairs*, 14 East. 374.
Horneyer v. Lushington, 3 Camp. 85.

indemnity, and under which, therefore, he must not retain any part of the subject matter insured, if he call on the underwriter to settle with him for a *total* loss of it.

A total loss of the former description takes place, then only, when no part of the subject matter of insurance exists in the hands, or for the benefit of the insured, or in such a state as to be fit for any useful purpose. Thus the loss will be total *per se*; not merely if the ship insured be consumed by fire, or destroyed by perils of the sea, or by some other means cease to exist *in specie*: but also, in case of seizure, detention, barratry, and so forth; if the dominion of the seizers continue, the loss is total, without abandonment. (*u*) And though we frequently find it laid down that a loss by perils of the sea cannot be total, if the thing exist in specie, yet, that must be taken only to mean, if it exist for any useful purpose; for if a ship be so battered as to be rather a congeries of planks, than a ship; (*v.*) or if the cargo be so damaged as to exist only in the shape of a nuisance; (*w*) in such cases the loss is total without abandonment.

When the loss is not total *per se*, the right to abandon depends on its amount. The doctrine formerly held on this subject, was, as succinctly stated in 2 Wms. Saund. 203. c. note 19, that when the voyage was lost, or the expense of pursuing it exceeded the benefit arising from it, and, therefore, it was not worth pursuing, in such case, the insured might abandon. But this doctrine is narrowed by late decisions, (*x*) and it does not seem possible to imagine a case in which the loss

(*u*) Mullett *v.* Shedden, 13 East. 304. Mellish *v.* Andrews, 15 East. 13. Bondrett *v.* Hentigg, 1 Holt. 149. Dixon *v.* Reid, 5 B. & A. 598.

(*v.*) Cambridge *v.* Anderton, 2 B. & C. 691. 1 R. & M. 60. Sed vide Bell *v.* Nixon, 1 Holt. 423, 5. Martin *v.* Crockatt, 14 East. 465.

(*w*) Dyson *v.* Rowcroft, 3 B. & P.

474. Cologan *v.* L. A. Co. 5 M. & S. 447.

(*x*) Anderson *v.* Wallis, 2 M. & S. 240. Falkner *v.* Ritchie, *ibid.* 293. Naylor *v.* Taylor, 9 B. & C. 724. Thornely *v.* Hebson, 2 B. & A. 513. Baalbridge *v.* Nelson, 10 East. 329. Brotherston *v.* Barber, 5 M. & S. 419.

of the voyage, independently of some great injury to the subject matter of insurance, would entitle the assured to abandon. At the same time, where the property has been in jeopardy, a partial preservation, recovery, or recapture of it may take place on such terms as will make the loss virtually total, and by rendering it impossible that there should be any effectual restitution, give the insured a right to abandon. (*y*) And if, on a misfortune taking place, the master acting under necessity, and in the exercise of a prudent discretion, for the benefit of all concerned, sell the property, and thereby put an end to the adventure, the assured may treat the loss as total, and abandon; (*z*) for instance, where from the nature of the place at which the damage happens, it is impossible to procure repairs there, or to proceed to another port for that purpose, (*a*) or where goods are so damaged, that they cannot be sent on to market, no means of transshipment exist, or from their nature, they are unfit to be kept for the purpose of being forwarded (*b*) to their destination.

When the insured are entitled to abandon, and think proper, for they are in no case obliged, to do so, they must give notice of abandonment within a reasonable time; (*c*) for it would be

(*y*) *Holdsworth v. Wise*, 7 B. & C. 794. *Parry v. Aberdein*, 9 B. & C. 411. *M'Iver v. Henderson*, 4 M. & S. 576. *Cologan v. L. A. Co.* 5 M. & S. 447. *Dixon v. Reid*, 5 B. & A. 597. *Gernon v. R. E. A. Co.* 6 Taunt. 383.

(*z*) *Idle v. R. E. A.* 8 Taunt. 755. 3 B. & B. 151. n. a. *Read v. Benham*, 3 B. & B. 147. *Meabourne v. Leckie*, 4 D. & R. 207. *Cambridge v. Anderton*, 2 B. & C. 691. *Robertson v. Clarke*, 1 Bingham. 445. *Robertson v. Carruthers*, 2 Stark. 571. Vide. *Smith v. Robertson*, 2 Dow. 474. *Doyle v. Dallas*, 1 M. & Rob. 48. *Gardner v. Salvador*, id. 116, which last cases are

strong to shew that there must be absolute necessity.

(*a*) *Robertson v. Clarke*, 1 Bingham. 445. *Read v. Bonham*, 3 B. & B. 147. See *Cambridge v. Anderton*, 2 B. & C. 291.

(*b*) *Gernon v. R. E. A.* 6 Taunt. 383. 2 Marsh. 88. *Freeman v. E. I. C.* 5 B. & A. 617. See *Morris v. Robinson*, 3 B. & C. 204. *Hudson v. Harrison*, 3 B. & B. 97. contra where there is not an absolute necessity. *Underwood v. Robinson*, 4 Camp. 138.

(*c*) *Mitchell v. Edie*, 1 T. R. 608. *Hunt v. R. E. A. Co.* 5 M. & S. 47. *Mellish v. Andrews*, 15 East. 13. *Alwood v. Henschall, Park*, 72.

unjust to allow them to take the chance of making the best of the accident for themselves, and only abandon to the underwriter when they found that did not answer; therefore a delay from September 6, to October 14, has been deemed too long. *(d)* So where the ship was surveyed at Kinsale on December 14, notice of abandonment given in London on January 6, was held too late, the ordinary course of communication being four or five days. *(e)* However, it is sufficient if notice be given in a reasonable time after the insured have received intelligence of the loss, and had an opportunity of ascertaining the extent of damage. *(f)* A notice in two days seems in one case to have been thought clearly sufficient. *(g)*

An abandonment cannot be partial, it must be of the whole thing insured. *(h)* It must also be unconditional, at least, unless the underwriter think proper to accept a conditional one. *(i)* It must be express too, and positive; a request to the underwriter to give directions for the disposition of the effects insured, and to settle for a total loss, is not sufficient. *(k)* But the underwriter may waive an informality in the notice of abandonment by his acquiescence, and, it has been thought, even by lying by, and making no objection to it. *(l)* The abandonment may be by parol. *(m)*

The effect of an abandonment is to divest the property of the thing abandoned out of the insured, and vest it in the

(d) Barker v. Blakes, 9 East. 283.

(e) Aldridge v. Bell, 1 Stark. 498.

See Kelly v. Walton, 2 Camp. 155.

(f) Read v. Bonham, 3 B. & B. 147.

Gernon v. R. E. A. 1 Holt, 47. 6 Taunt. 383.

(g) Anderson v. Wallis. 2 M. & S. 241.

(h) Park. 229, Marsh. 600.

(i) M'Masters v. Shoolbred, 1 Esp. 239.

(k) Parmeter v. Todhunter, 1 Camp. 541. Da Costa v. Newnham, 2 T. R.

407. Havelock v. Rockwood, 8 T. R.

268. Lockyer v. Offley, 1 T. R. 258.

Thellusson v. Fletcher, 1 Esp. 73.

(l) Hudson v. Harrison, 3 B. & B.

97. See Da Costa v. Newnham, 2 T. R.

407. Hagedorn v. Whitmore, 1 Stark. 157.

(m) Read v. Bonham, 3 B. & B. 149.

See, however, Ld. Ellenborough's remarks as to the propriety of using writing, and inserting the word *abandon*. Parmeter v. Todhunter, 1 Camp. 541.

insurer, for whom the former becomes a trustee. (n) So completely has it this effect, that where a ship is abandoned, the right to freight which she may subsequently earn passes to the insurer, though such freight may be the subject of another insurance with other underwriters; (o) the abandonment operating like a sale or assignment of the ship, which transfers the freight as an incident. (p) But the insurers, of course, only receive the balance which may remain after deducting the necessary expenses incurred in the preservation of the property abandoned to them. (q)

Partial loss.—The terms *partial loss* need no explanation; it is, however, proper to remark, that a loss which was once total, may by matter *ex post facto* become a partial one. Thus, if a ship be captured, the loss is total, and, no doubt, if she continue in the power of the enemy up to the time of bringing the action, the insured may recover for a total loss. But if she escape, or be recaptured, so as to be still of value, that which was once a total loss becomes a partial one. (r) So, when there is a policy on freight, and the ship is detained under an embargo, the loss is *prima facie* total: yet, if the embargo be taken off, and she afterwards earn freight, it becomes partial. (s)

With respect to the mode in which the sum to be paid by the underwriter, on account of a partial loss, is calculated; if the damage was suffered by *the ship*, and has been repaired by the owner, he will not be allowed the full cost of repairing,

(n) *Randall v. Cockran*, 1 Ves. sen. 602. *Chinnery v. Blackburne*, 1 H. 98. *Leatham v. Terry*, 1 B. & P. 478. Bl. 117.

Thompson v. Rowcroft, 4 East. 31.

(o) *Case v. Davidson*, 5 M. & S. 79. 2 B. & B. 379. *Thompson v. Rowcroft*, 4 East. 47. *Sharp v. Gladstone*, 7 East. 30.

(p) *Kerswill v. Bishop*, 2 Tyrwh.

(q) *Sharp v. Gladstone*, 7 East. 30.

(r) 2 Wms. Saund. 203. b. n. 19. *Bainbridge v. Neilson*, 10 East. 329. *Brotherston v. Barber*, 5 M. & S. 418. *Patterson v. Ritchie*, 4 M. & S. 393.

(s) *Macarthy v. Abel*, 5 East. 388. *Everth v. Smith*, 2 M. & S. 278.

but one third is deducted in consideration of the benefit which he derives from the new materials, in lieu of the old: (t) if by the goods, the mode adopted is, to ascertain the difference between the gross proceeds of the goods, on their arrival at their destined port, and what would have been their gross proceeds, had they not been injured. Then, as what would have been their gross proceeds if sound, is to their gross proceeds when damaged, so is their original value to a fourth quantity, which fourth quantity being subtracted from the original value, will give the sum to be paid by the underwriters. (u) Thus, suppose the original value was 100*l.*; that the cargo, had it arrived safe at the end of its voyage, would have fetched 200*l.* but, in its damaged state, will fetch only 150*l.*; then, as $200 : 150 :: 100 :$ to the sum required, which will, therefore, amount to 75*l.*, subtracting 75*l.* from 100*l.* the original value, we obtain 25*l.* the estimated loss which must be made good by the underwriter. The reason for adopting the original value, as the basis of this calculation, is, that the insurance is a contract of indemnity, and the assured ought not to be allowed to make a profit by it, which he would do, if he were to receive any more than he originally paid. The mode of ascertaining the original value of the goods in the case of an open policy, is, to take the invoice price at the loading port, and add to that, the premium of insurance, and commission (w); these being both charges to which the insured has actually been put, on account of the goods, in order to send them on the voyage: whether a payment on the shipment of the goods can be added to their value, is a question as yet undecided. (x) When the policy is a valued one, the parties have themselves agreed on the original value of the

(t) *Poingdestre v. R. E. A.* 1 R. & M. 378. See *Da Costa v. Newnham*, 2 T. R. 407. *v. Rucker*, 2 Burr. 1167. *Hurry v. R. E. A.* 3 B. & P. 308.

(w) *Langhorn v. Alnutt*, 4 Taunt. 511.

(u) *Usher v. Noble*, 12 East. 639. *Johnson v. Shedden*, 2 East. 531. *Lewis*

(x) *Winter v. Haldimand*, 2 B. & Ad. 650.

goods, and the standard is therefore adopted, which they have fixed in the policy. (y) If the policy be on freight, and open, which is uncommon, the usage is to calculate the loss upon the gross, not on the net value. (z)

Generally speaking, where property which has been partially deteriorated, is afterwards totally lost to the insured, and the previous deterioration thus becomes a matter of perfect indifference to his interest, he cannot make it the ground of a claim upon the underwriters; for of what consequence is the intermediate condition of the thing, if he be never to receive it again? But there may be cases, in which, though a prior damage be followed by a total loss, the assured may, nevertheless, have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss. Actual disbursements, for repairs in fact made, in consequence of injuries by perils of the seas, previous to the happening of the total loss, are of this description; unless, indeed, they are more properly to be considered as covered by that authority with which the assured is usually invested by the policy "of suing, labouring, and travailing, &c., for, in, and about the defence, safeguard, and recovery of the property insured," in which case the amount of such disbursements might more properly be recovered, as money paid for the underwriter, under the direction and allowance of this provision of the policy, than as a substantive average loss, to be added cumulatively to the amount of the total loss which is afterwards incurred. For such disbursements, the underwriter is liable over and above the amount of his subscription. (a)

(y) *Lewis v. Rucker*, 2 Burr. 1167.
See 12 East. 647.

(a) *Levie v. Sanson*, 12 East. 648.
Le Cheminant v. Pearson, 4 Taunt. 367.

(z) *Palmer v. Blackburn*, 1 Bingham. 62.

SECTION V.—*Proceedings after a Loss.*

Adjustment.—When a loss has taken place, unless the underwriter can deny his liability to make it good, he usually proceeds to *adjustment*, which is the settling and ascertaining the amount which the assured, after all allowances and deductions are made, is entitled to receive under the policy, and fixing the proportion which each underwriter is liable to pay: it operates as an admission of all the facts necessary to constitute the underwriter responsible; (b) but it is not conclusive upon him, and though it is incumbent on an underwriter who has once admitted his liability by an adjustment, to make out a strong case, yet, until actual payment of the money, he may avail himself of any defence which the law or facts will furnish. (c)

If the underwriter contest his liability, he either relies upon the absence of some of the abovementioned requisites to a contract of insurance; by alleging, for instance, that the insured is an alien enemy; or that there is no legal subject matter of insurance, *ex. gr.* that the policy is a wager policy, or a contract of re-assurance; or he insists that the risk never began, as for instance that the ship cleared out and sailed on a voyage different from that insured; or that he has been discharged by a breach of warranty, *ex. gr.*, by a deviation: or he contends that the policy is vitiated by fraud, misrepresentation, or concealment on the part of the insured. All these grounds of defence have been already treated of, except the last, on which we will now say a few words.

It is essential that in all contracts of insurance the strictest

(b) *Voller v. Griffiths*, S. N. P. 983.
Rodgers v. Naylor, Park, 194. *Christian v. Coombe*, 2 Esp. 489. *Shepherd v. Chewter*, 1 Camp. 274.

(c) *Herbert v. Champion*, 1 Camp. 134. *De Garron v. Galbraith*, Peake, Add. Ca. 37. Note by Mr. Campbell to *Shepherd v. Chewter*, cited ante.

good faith should be observed, for fraud, concealment, or misrepresentation of any material circumstance, avoids the whole contract; thus if the underwriter assures a ship as on her voyage, which he privately knows to be arrived, the policy is void, and the assured may bring an action against him to recover back the premium. (*d*) So if the assured or his agent conceal or misrepresent any material fact relating to the property insured, the policy is void, and the insurer not liable. (*e*) When this takes place the policy is vacated *ab initio*, and the underwriters may use it as a defence, though the loss have arisen from a cause wholly unconnected with the circumstance concealed or misrepresented. (*f*) A misrepresentation of a material fact vitiates the policy, whether the party assert a thing he knows to be false, or does not know to be true. (*g*) The misrepresentation will be of a material fact, if it consist of an assertion that the ship was safe on a particular day, will sail at a particular time, (*h*) or will sail in company, and carry a certain force. (*i*) A misrepresentation, made to the first underwriter in a material point, is considered as a misrepresentation to every one of the underwriters, for they are all supposed to follow the first. (*k*) But a misrepresentation made to any underwriter other than the first, is not to be considered as made to subsequent underwriters; (*l*) and the rule concerning the effect of a misrepresentation to the first, is founded,

(*d*) Carter *v.* Boehm, 3 Burr. 1909.
 (*e*) Carter *v.* Boehm, 1 Blackst. 594.
 3 Burr. 1905. Middlewood *v.* Blakes,
 7 T. R. 162. Willes *v.* Glover, 1 N.
 R. 14. Roberts *v.* Fonnereau, Park.
 176. Da Costa *v.* Scandret, 2 P. W.
 170. Hodgson *v.* Richardson, 1 Bl.
 463. Fitzherbert *v.* Mather, 1 T. R.
 12.

(*f*) Per Lee, C. J. Leaman *v.* Fonnereau, Str. 1183.

(*g*) Macdoual *v.* Fraser, Dougl. 260.

Chaurand *v.* Angerstein, Peake, 43.
 Duffel *v.* Wilson, 1 Camp. 401.

(*h*) Supra, last note. Roberts *v.*
 Fonnereau, Park. 285.

(*i*) Edwards *v.* Footner, 1 Camp.
 530.

(*k*) Pawson *v.* Watson, Cowp. 785.
 Barber *v.* Fletcher, Dougl. 306. Marsden
v. Reid, 3 East. 573.

(*l*) Bell *v.* Carstairs, 2 Camp. 543.
 Brine *v.* Featherstone, 4 Taunt. 869.

it is said, more upon precedent than reason, (*m*) and must be received with great qualification. (*n*)

If a representation be *substantially* true, that is sufficient, and in this respect it differs from a warranty, which must be *literally* complied with. Thus where it was represented that the ship would carry twelve guns and twenty men, and she really carried nine guns and six swivels, and sixteen men and eleven boys, a force equal in amount to that represented, the policy was not avoided. (*o*) Moreover if the party who effects the policy do not make his assertion positively, but only as a matter of expectation and belief, it will be sufficient if he really believe it. (*p*)

As to *concealment*, it is as fatal to the policy as misrepresentation; for insurance is a contract founded in speculation, and a knowledge of all the facts is necessary to enable the underwriter to calculate and form a just estimate of the risk; nor is it an excuse that the concealment was attributable to the fraud or neglect of an agent, (*q*) or that the account concealed was false, (*r*) or in no way referred to the subsequent cause of loss, (*s*) or was not concealed with a fraudulent design; (*t*) nor does it matter whether it was known, as a report, or as a matter of positive intelligence. (*u*) But the concealment which vitiates a policy must be of a fact *material* to a just estimate of the risk; (*w*) and therefore the main question respecting concealment almost always is, whether the fact concealed be

(*m*) Per Heath J., in *Brine v. Featherstone*.

(*n*) Per L. Ellenborough, in *Forrester v. Pigou*, 1 M. & S. 13.

(*o*) *Pawson v. Watson*, Cowp. 785. *Bize v. Fletcher*, Dougl. 275. *Nonnen v. Reid*, 16 East. 176. *Von Tungein v. Dubois*, 2 Camp. 151.

(*p*) *Barber v. Fletcher*, Dougl. 292. *Bize v. Fletcher*, Dougl. 275. *Hubbard v. Groves*, 3 Camp. 313. *Bowden v.*

Vaughan, 10 East. 415. *Brine v. Featherstone*, 4 Taunt. 869. *Driscoll v. Passmore*, 1 B. & P. 200. *Weston v. Emes*, 1 Taunt. 115.

(*q*) *Fitzherbert v. Mather*, 1 T. R. 12.

(*r*) See 3 Taunt. 37.; 14 East. 494.

(*s*) 2 Str. 1183.

(*t*) 3 Burr. 1905.; 1 T. R. 12.

(*u*) *Durrell v. Bederley*, 1 Holt. 238. Gibbs, C. J.

(*w*) *Durrell v. Bederley*, ubi supra.

a material one. Of this description have been held to be—intelligence that the vessel about to be insured, or a ship like her, has been lost, or which induced the owner to fear that she may be so : (x) information respecting the time or manner of her sailing, which is material to the probability of her safety; such for instance as would shew her to be a missing ship, or out of time; or that she had encountered bad weather; or that another ship, which sailed before her, had arrived first; (y) intelligence that she has been met with in a leaky state, (z) or had from some other cause sustained damage before the commencement of the risk; (a) or that she is in danger of an attack, as if a man were to insure a ship, knowing that enemies were lying in wait for her. (b) A merchant resident at Sidney shipped goods by the ship C. for England, and by another ship, that sailed after the ship C., wrote to an agent in England, desiring him, if he received that letter before the C. arrived, to wait for thirty days, in order to give every chance for her arrival, and then effect an insurance on the goods; the letter was received, and the agent having waited more than thirty days, employed a broker to effect an insurance, and handed the letter to him; the broker told the underwriter when the C. sailed, and when the letter ordering the insurance was written, but he did not state when it was received, nor the order to wait thirty days after the receipt of it, before effecting an insurance. The C. never arrived. In an action on the policy, no fraud was imputed to

(x) *Da Costa v. Scandret*, 2 P. Wms. 170. See 1 Show. 324. *Fitzherbert v. Mather*, 1 T. R. 12. *Gladstone v. King*, 1 M. & S. 38.

(y) *Kirby v. Smith*, 1 B. & A. 672. *M'Andrew v. Bell*, 1 Esp. 373. *Webster v. Foster*, 1 Esp. 407. *Willes v. Glover*, 1 N. R. 14. *Bridges v. Hunter*, 1 M. & S. 15. *Sawtell v. London*, 5

Taunt. 359. *Elton v. Larkins*, 8 Bing. 198.

(z) *Lynch v. Hamilton*, 3 Taunt. 37. *Lynch v. Dunsford*, 14 East. 49.

(a) *Gladstone v. King*, 1 M. & S. 35.

(b) *Carter v. Boehm*, 3 Burr. 1905. Bl. 593. *Beckwaite v. Walgrove*, cited 3 Taunt. 41. *Durrell v. Bederly*, 1 Holt. 283.

the plaintiff, but several underwriters were called, who stated that in their opinion the matters not communicated were material; and the jury being of opinion, that a material part of the letter had been concealed, found a verdict for the defendant. It was held that the evidence of the underwriters was properly received; (c) and that even had it not been so, the jury would have been bound to find that the uncommunicated part of the letter was material, and the policy consequently void. (d)

But the rule respecting concealment is confined to matters which lie within the private knowledge of the insured. He need not mention what the underwriter knows, or ought to know,—*scientia utrinque par pares contrahentes facit*. He need not mention general topics of speculation, such as the difficulty of the voyage, the nature of the season, the probability of lightning, hurricanes, and earthquakes, of danger from the ruptures of states, from war, and the various operations of war. Men argue differently from natural phenomena and political appearances,—they have different capacities, different degrees of knowledge, and different modes of thinking; but the means of information are open alike to all, each professes to act from his own skill and sagacity, and therefore neither need communicate to the other the result of his individual judgment. (e) The insured need not communicate the usage of trade, for the underwriter is supposed to know it; (f) nor a fact which the underwriter may learn by the exercise of proper diligence, for instance, as it would seem, facts con-

(c) It has since been considered that this evidence was improperly admitted. The question of materiality is for the jury. *Campbell v. Rickards*, 2 Nev. & Mann. 546.

(d) *Rickards v. Murdock*, 10 B. & C. 527. See *Campbell v. Rickards*, 2 Nev. & Mann. 546.

(e) *Carter v. Boehm*, 3 Burr. 1905.

(f) *Noble v. Kennoway*, Dougl. 510. *Vallance v. Dewar*, 1 Camp. 503. *Ougier v. Jennings*, id. 505. *Grant v. Paxton*, 1 Taunt. 463. *Moxon v. Atkins*, 3 Camp. 200. *Stewart v. Bell*, 5 B. & A. 238. *Planche v. Fletcher*, Dougl. 238.

tained in the printed English list at Lloyd's; (g) but the announcement of a material fact in the *foreign* list at Lloyd's will not dispense with a communication from the insured. (h) The insured is not bound to communicate matter which forms an ingredient in a warranty, such for instance, as that of seaworthiness; thus, where the assured received a letter mentioning that the ship had been surveyed at Trinidad, on account of *her bad character*; but the survey which accompanied the letter, gave the ship a good character; the concealment of this did not vacate the policy; for the insured impliedly warranted the ship to be seaworthy, and it did not appear either that she was, or that he had reason to think that she was, otherwise. (i) If, after the broker has been instructed to effect a policy, his principal receive further intelligence, but the policy is effected before the principal can communicate it to the broker, the policy is valid if the principal and broker appear to have acted with due diligence. (k) And in every case the question, whether the non-communication of a fact vacates the policy, depends, as has been before said, upon the further question, whether that fact was a material one. (l) Thus, in some cases, the time of the ship's sailing has been held immaterial; (m) nor need the insured state to the underwriter general circumstances connected with the history and capabilities of the ship, *ex. gr.* her age, where she was built, what was her construction, whether clinker built, or not, whether copper-bottomed, when, how, and where repaired, &c.: circumstances of this nature would

(g) *Friere v. Woodhouse*, 1 Holt. 572. Quere, whether this case be not shaken by *Elton v. Larkins*?

(h) *Elton v. Larkins*, 8 Bing. 198.

(i) *Haywood v. Rogers*, 4 East. 590, *Shoolbred v. Nutt*, Park, 346.

(k) *Wake v. Atty*, 4 Taunt. 493.

(l) See *Littledale v. Dixon*, 1 N. R. 151. *Beckwith v. Sydebottom*, 1 Camp.

116. *Weir v. Aberdeen*, 2 B. & A.

320. *Taylor v. Wilson*, 15 East. 324.

2 Dow. 367. *Boyd v. Dubois*, 3 Camp.

133. *Bell v. Bell*, 2 Camp. 479.

(m) *Fort v. Lee*, 3 Taunt. 381. *Foley v. Maline*, 5 Taunt. 430. 1 Marsh.

117. See *vide Bridges v. Hunter*, 1 M.

& S. 15. *Kirby v. Smith*, 1 B. & A.

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no doubt have weight in guiding the judgment of the underwriter; but it is not essential to the fairness of the contract, that the insured should, in the first instance, disclose them; it is sufficient if he answer truly when it is demanded of him. (n)

Return of Premium.—If the underwriter should succeed in establishing a defence against his liability upon the policy; a question immediately arises whether the insured be entitled to a *return of premium*, and if so, whether to a return of all or part. On this subject the parties sometimes enter into an agreement, and if they do, the terms of that must, of course, be observed, (o) and will regulate the amount of the sum to be returned, and the circumstances under which it is returnable. (p) If there be no express stipulation, the question of return or no return, is regulated by two main principles. *First.* Where the risk has not been run, the premium shall be returned; for the underwriter receives it for running the risk, and if he do not run the risk, he ought not to retain it. (q) Thus if the policy were made on goods, and no goods are put on board the ship, the premium must be returned; (r) and on this ground rests the return of premium for *short interest*, which occurs when part only of the goods embraced by the policy, is put on board, in which case a portion of the pre-

(n) See *Haywood v. Rogers*, 4 East. 596. *Freeland v. Glover*, 7 East. 464. See *Long v. Duff*, 2 B. & P. 20.

(o) *Audley v. Duff*, 2 B. & P. 111.

(p) See *Kellner v. Le Mesurier*, 4 East. 396. *Leevin v. Cormack*, 4 Taunt. 483. *Dalgleish v. Brooke*, 15 East. 295. *Aguilar v. Rogers*, 7 T. R. 421. *Simmonds v. Boydell*, Doug. 255. *Horncastle v. Haworth*, 2 Marsh. Ins. 674. *Langhorn v. Alnutt*, 4 Taunt. 511, which last two cases seem at variance. *Long v.*

Allen, Park, 589, where the decision turned on the usage of trade.

(q) *Routh v. Thompson*, 11 East. 432. *Oom v. Bruce*, 12 East. 225. *Hentig v. Stanniforth*, 5 M. & S. 122. 4 Camp. 270. *Siffken v. Alnutt*, 1 M. & S. 39. *Feize v. Parkinson*, 4 Taunt. 640. *Penson v. Lee*, 2 B & P. 330. Vide *Hagedorn v. Oliver*, 2 M. & S. 491. *Macculloch v. R. E.* 3 Camp. 406. *Lowry v. Bordieu*, Doug. 467.

(r) *Martin v. Sitwell*, 1 Show. 156.

mium corresponding to the deficiency, must be returned. (s) So where profits are the subject of insurance, there may be a return of premium for short profits. (t) But if it be a valued policy, and all the goods intended were put on board, the insured will not be entitled to a return, on the ground that they were not of the value specified. (u)

Secondly.—When the risk embraced by the policy is entire, and has once commenced, there can be no return of the premium, or of any part of it; (w) thus, even if the insurance be for twelve months at a certain rate per month, and the risk ceases at the end of two months, there can be no apportionment or return of premium; (x) for the whole risk attached, the underwriter would have been obliged to settle for a total loss, had such a one taken place within the two months, and the specification of a certain sum per month, is only a mode of computing the gross amount of premium. Again, if a ship insured from A. to B. sail in an unseaworthy condition, the underwriter's risk never commences; (y) and the premium, as we have seen, must be re-returned. But if a vessel be insured *at and from* A. to B., and sail in an unseaworthy condition, no portion of the premium is returnable; for the risk attached, while she remained at A., before she sailed, and if she had been lost while there, a total loss would have been payable. (z) So again, if the ship deviate, the underwriter is discharged; yet, inasmuch as the risk once attached, and as he might have been subjected to a total loss, had she perished before she had reached the point of deviation, no portion of the premium is returnable. (a)

(s) Eyre v. Glover, 16 East. 218.
Horneyer v. Lushington, 15 East. 46. 3
Camp. 90.

(t) S. C.

(u) 4 Bro. P. C. 450. 464.

(w) Tyrie v. Fletcher, Cowp. 666.
Bermon v. Woodbridge, Dougl. 751.
Langhorn v. Cologan, 4 Taunt. 330.

(x) Loraine v. Thomlinson, Dougl.
564.

(y) Penson v. Lee, 2 B & P. 330.

(z) Annen v. Woodman, 3 Taunt.
299. Meyer v. Gregson, Park, 588.

(a) Tait v. Levi, 14 East. 481.
Moses v. Pratt, 4 Camp. 297.

We have seen that there can be no return of premium, where the risk is entire, and has once commenced. But if the insurance be in effect on two or more voyages, and one or more have not commenced, there shall be an apportionment and return of premium, in respect of those voyages that have not commenced; for in such a case the risk is not entire, nor is the underwriter for a single moment liable to make good any loss incurred during the latter voyages. (b) The usual mode of shewing that the risk is to be considered as thus divided, is by proving a usage of trade to that effect, of which usage the underwriter must, of course, be presumed cognizant. (c) Thus, where the insurance was from London to Halifax, warranted to depart with convoy from Portsmouth; the ship not having departed with convoy from Portsmouth, and the jury having found an usage to return part of the premium in such a case; the court thought that the contract was for an insurance from London to Halifax; which contract, in case of the ship's not departing from Portsmouth with convoy, was to be reduced to an insurance from London to Portsmouth; that as she had not departed from Portsmouth with convoy, the contract had been so reduced, and consequently that there must be a part-return of premium for the risk never incurred, viz. that from Portsmouth to Halifax. (d)

It remains to observe, that even where the risk never commenced, yet, if the assured or his agent have been guilty of fraud, for instance, if he knew that the ship was lost when he insured her, there can be no return of premium. (e) The same rule holds, if the insurance be illegal, and the voyage have been performed, (unless the parties could not have known of the illegality, (f) or believed that the risk would be legal,

(b) *Stevenson v. Snow*, 3 Burr. 1237.

(c) *Long v. Allen*, Marsh. 370.
Stevenson v. Snow, ubi supra.

(d) *Stevenson v. Snow*, ubi supra.

(e) *Wilson v. Duckett*, 3 Burr. 1361.

Tyler v. Horne, Park, 329. *Chapman v. Fraser*, id ibid.

(f) *Oom v. Bruce*, 12 East. 225.

and took the usual effective steps to make it so,) (g) for *pari delicto potior est conditio possidentis*. (h) But this maxim does not apply where the return of premium is claimed before the voyage has commenced: for then the contract being still executory, there is a *locus pœnitentiæ*, and either party has a right to rescind it, since by doing so, he prevents the commission of that which the law forbids. (i) However, the party seeking to rescind, must formally renounce the contract, and give notice to the underwriter that he has done so, before he can bring an action to recover back the premium. (k)

When the insured is compelled to sue the underwriter, the form of action he adopts is generally *assumpsit*. If, indeed, the insurer be the Royal Exchange or London Assurance Company, the defendant being a corporation, and the policy a deed, the action must be one of debt or covenant, to which a general plea is given, by stat. 11 G. 1. c. 30. s. 43.

When several actions are brought on a policy against several underwriters, the Court will make a rule for staying the proceedings in all the actions except one, on the defendant's undertaking to be bound by the verdict in that action, and consenting to other reasonable terms. (l) But though all the defendants are bound to abide by the verdict in that single action, the plaintiff is not so; (m) however, if he proceed in a second action without leave of the Court, he will not be allowed the benefit of the terms imposed on the defendants by the consolidation rule.

(g) *Hentig v. Stanniforth*, 5 M. & S. 122.

(h) *Wilson v. R. E. A.* 2 Camp. 626. *Cowie v. Barber*, 4 M. & S. 16. *Toulmin v. Anderson*, 1 Taunt. 227. *Lowry v. Bordieu*, Dougl. 451. *Andrée v. Fletcher*, 3 T. R. 266.

(i) See per Buller, J. *Lowry v. Bor-*

dieu; and see 3 Taunt. 283. Sed vide *Palyart v. Leckie*, 6 M. & S. 290, and the remarks of Abbott, J. there.

(k) *Palyart v. Leckie*, 6 M. & S. 290.

(l) For the history of, and practice on, this subject, see Tidd, 9th ed. 614.

(m) *Doyle v. Douglass*, 4 B. & Ad. 545. *Long v. Douglas*, *ibid.*

CHAPTER V.

INSURANCE UPON LIVES.

INSURANCE upon a life, is a contract by which the insurer in consideration of a certain premium, either in a gross sum or by annual payments, undertakes to pay, to the person for whose benefit the insurance is made, a certain sum of money or annuity, on the death of the person whose life is insured. If the insurance be for the whole life, he undertakes to make the payment *whenever the death happens*; if otherwise, he undertakes to make it, in case the death should happen within a certain period, for which period the insurance is said to be made. The utility of this contract is obvious. A creditor is enabled thereby to secure his debt; an annuitant the continuance of his income after the grantor's decease; a father a provision for his family, available in case of his own death. However, as an unlimited power of effecting insurances of this description would give rise to a species of gambling; it is enacted by stat. 14 G. 3. c. 48. "That no insurance shall be made by any person or persons, bodies, politic, or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever; (a) wherein the person or persons for whose use, benefit, or on whose account, such policies should be made, should have no interest, or by way of gaming, or wagering: and every insurance made contrary to the true intent and meaning thereof, shall be null and void to all intents and purposes." (b)

(a) Perhaps it might not be very applicable. See *Paterson v. Powell*, 9 Bing. 32.
easy to say to what description of wagers, particularly if written, this statute is in- (b) Sect. 1.

“ That it shall not be lawful to make any policy or policies, on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies, the person's name interested therein, or for whose use benefit, or on whose account such policy was so made or underwritten.(c)

“ That in all cases where the insured had an interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers, than the amount or value of the interest of the insured in such life or lives, or other event or events.” (d)

Marine insurances are exempted from the operation of this act.(e)

A creditor has an insurable interest in the life of his debtor,(f) provided the debt be not an illegal one;(g) and a trustee may insure in respect of the interest of which he is trustee.(h) But, as insurance is a contract of indemnity, the insured can found no claim upon his policy, if the debt or other interest in respect of which he made it, be satisfied *aliunde*.(i)

Lord Tenterden has expressed a strong opinion, that the word “ interest,” in the statute above cited, means a *pecuniary* interest;(k) and in the same case it was held that a father had not such an interest in his son's life as would entitle him to insure it. But Lord Kenyon was of opinion that a wife, making an insurance on her husband's life, need not prove she was interested therein, for that it must be presumed.(l)

Before the policy is effected, it is usual for the person whose life is insured to subscribe a declaration concerning his age, health, and other circumstances; this declaration is recited

(c) Sect. 2.

(d) Sect. 3.

(e) Sect. 4.

(f) *Anderson v. Edie*, Park. 640.

(g) *Dwyer v. Edie*, Park. 639.

(h) *Tidswell v. Angerstein*, Peake,

(i) *Godsall v. Boldero*, 9 East. 72.

Ex parte Andrews, 1 Madd. 574.

(k) *Halford v. Kymer*, 10 B. & C. 725.

(l) *Reed v. R. E. A. Co.*, Peake, Add.

Ca. 70.

and incorporated by reference in the policy, at the end of which a proviso is ordinarily inserted, declaring the policy to be void, in case the insured should die upon the seas, or go beyond the limits of Europe, without leave obtained, commit suicide, or die by the hands of justice, *(m)* or if the age of the assured exceed years, or he be afflicted with any disease, which tends to the shortening of life, or, in case the declaration should contain any averment which is not true. These are the usual conditions, but they are sometimes varied to suit the objects of different insurers. In construing them, a condition that the person is in good health, is understood to mean that he is in reasonably good health, not that he is free from the seeds of disorder. Such a condition has been held to be complied with, though the party whose life was insured, was troubled with spasms, cramps, and violent fits of the gout. *(n)* Nor is it to be concluded, that a disease is one tending to shorten life, within the meaning of the policy, from the single fact that the party afterwards dies of it, if it be not a disorder necessarily having that tendency. *(o)* As to the provisions respecting suicide and death by the sentence of the law, those are superfluous, for the policy would be unavailable to the representatives of the insured in case of such a death, even if they were not inserted; and if a man insuring his own life were to introduce a contrary provision, it would be void, as against public policy. *(p)*

If there be no warranty or condition on the part of the insured, the insurer is subject to all risks, unless he can shew a fraudulent concealment or misrepresentation, *(q)* either of which will avoid the policy. It is the duty of the insured

(m) The provisions respecting suicide or death by the hands of justice are seldom or never inserted, except where a man insures his own life.

(n) *Willis v. Poole*, Marsh. 669. *Ross v. Bradshaw*, 1 Bl. 312.

(o) *Watson v. Mainwaring*, 4 Taunt. 763.

(p) *Amicable Assurance Society v. Bolland*, D. P. July 9, 1830, reversing Jt. of M. R. reported, Selw. N. P. 1043.

(q) *Stackpole v. Simon*, Park. 648.

to disclose all material facts within his knowledge, and, if the fact suppressed be material, it signifies not, whether the party did, or did not, believe it to be so, its materiality being a question for the jury.^(r) Where one person insures the life of another, the party whose life is insured, if applied to for information, is, in giving it, impliedly the agent of the party insuring, who is therefore bound by his statements, and must suffer if they be false, though he himself was not acquainted with the life insured.^(s)

- (r) *Lindenau v. Desborough*, 8 B. & East. 188. *Swete v. Fairlie*, 6 Carr. & C. 592. *Morrison v. Maspratt*, 4 Bing. Pay. 1. *Williams v. Duckett*, cited, 60. *Hugenin v. Rayley*, 6 Taunt. 186. *ibid.* 3. *Von Lindenau v. Desborough*, 3 Carr. & P. 353.
 (s) *Everett v. Desborough*, 5 Bing. 503. See *Aveson v. Lord Kinnard*, 6

CHAPTER VI.

INSURANCE AGAINST FIRE.

By this contract, the insurer, in consideration of a certain premium, paid, either in gross, or at stated intervals, undertakes to indemnify the assured against damage to his property by fire, during a limited period of time. It is necessary that the insured should have an interest in the property protected; (a) in case of loss, he will only be able to recover to the extent of that interest; and there is this peculiarity incidental to the contract of insurance against fire, viz. that it is not assignable, (b) except with the consent of the insurer.

A misrepresentation, or concealment, of material facts, is as fatal to this, as to any of the other contracts of insurance. To use the words of Mr. J. Bayley, (c) "In all insurances, whether on ships, *houses*, or lives, the underwriter should be informed of every material circumstance within the knowledge of the insured, and the proper question is, whether any particular circumstance was in fact material, not whether the party believed it to be so." (d) But, though the most appropriate phrase be not employed, yet, if the description of the property be substantially correct, and a more accurate statement would not have varied the premium, the error is not material. (e) It is necessary to be extremely accurate in describing the nature of the property intended to be insured, in order that it may not fall

(a) Stat. 14 G. 3. c. 48. cited in last chapter.

(b) *Lynch v. Dalzell*, 4 Bro. P. C. 431. *Sadler's Co. v. Badcock*, 2 Atk. 554.

(c) In *Lindenau v. Desborough*, 8 B. & C. 592.

(d) Accord. *Bufe v. Turner*, 2 Marsh. 46. 6 Taunt. 338.

(e) 1 R. & M. 92. See *Doe d. Pitt v. Lang*, 4 Camp. 76.

without the scope of the policy. For where a policy was effected on "Stock in trade, household furniture, *linen*, wearing apparel, and plate," the person insured not being a linen draper, this was held not to protect linen subsequently purchased on speculation, the word *linen* in the policy being taken to mean household linen, or linen used by way of apparel. (f) If a building be described as of one class, instead of another, when a larger premium would have been required for that other, the policy becomes completely void. (g)

Every warranty or condition, inserted in the policy, or incorporated into it by reference from the printed proposals, which are considered parcel of the contract, must be strictly and literally observed. Thus, where it was stipulated in the proposals, that loss money should not be payable till the insured should have produced a certificate of character from the minister of the parish, it was held that he could not recover, even though the minister should have *wrongfully* refused to grant such certificate; for that if a man undertakes for the act of a stranger, he must see it done. (h)

The insurance being against fire, a loss by fire must of course happen, in order to give the insured a claim upon the policy. Where the register of a sugar house was kept shut by mistake, so that the sugar was overheated and spoilt, this was held not to be a loss *by fire*, but by mismanagement. (i) The policy

(f) Watchorne v. Langford, 3 Camp. 422.

(g) Newcastle Fire Ins. Co. v. M'Morean, 3 Dow. 255. See Doe d. Pitt v. Lang, 4 Camp. 76. Dobson v. Sotheby, 1 R. & M. 90. Risks are commonly divided by the insurance offices into three classes: 1st, *Common Insurances*; 2dly, *Hazardous*; 3dly, *Doubly Hazardous*. There are, besides, a few cases of what is called *Extraordinary Risk*, *ex gr.*, those of sugar refineries; these are generally excluded

from the table of premiums, and made subjects of special agreement. Cash and securities for cash are, I believe, seldom insurable on any terms.

(h) Worsley v. Wood, 6 T. R. 710. See also Saloin v. James, 6 East. 571. Routledge v. Burrell, 1 H. Bl. 254. Oldman v. Bewicke, 2 H. Bl. 577. n. Tarleton v. Stanniforth, 5 T. R. 695. 1 B. & P. 471.

(i) Austin v. Drew, 6 Taunt. 436. 4 Camp. 360. Holt, 126.

usually narrows the liability of the insurer still further, by declaring that "no loss or damage by fire, happening by any invasion, foreign enemy, or any military and usurped power, will be made good by the insurers." The words *usurped power* are understood to refer to the power of rebels or invaders, not of a common mob, and, therefore, when a mob at Norwich burnt the insured's malting-house down, he was held entitled to recover; (k) nor would the fact that the insured had previously recovered from the insurer, bar his action against the Hundred, for he might sue it as a trustee for the insurer. (l) But the introduction of the words *civil commotion* into the above exception, will exempt the insurer, from liability, for the tumultuous act of rioters. (m)

(k) Drinkwater v. London I. C. 2 254. Mason v. Sainsbury, Marsh. Ins. Wils. 363. 796.

(l) Clark v. Blything, 2 B. & C. (m) Langdale v. Mason, Park, 657. Marsh. 689.

CHAPTER VII.

BOTTOMRY AND RESPONDENTIA.

BOTTOMRY is an agreement entered into by the owner of a ship, or his agent, whereby, in consideration of a sum of money advanced for the use of the ship, the borrower undertakes to repay the same with interest, if the ship terminate her voyage successfully, and binds or hypothecates the ship for the performance of his contract. The instrument by which this is effected, is sometimes in the shape of a deed poll, and is then called a Bottomry Bill; sometimes in that of a bond; (a) but whatever be its form, the contract should be clearly set out in it. Bills of Exchange drawn by the master, or the owner, though accompanied with a verbal engagement, that the ship shall be liable, cannot be considered instruments of hypothecation. (b)

If the loan be not upon the vessel, but on the goods or merchandize laden on board her, it is called *Respondentia*.

There are two main differences between these contracts and a common loan.

1st. *The Risk*.—The lender's principal must be at hazard during the voyage. The lender of the money is, as we shall immediately see, entitled to receive a recompense far beyond the legal rate of interest; this recompense is very properly called in the civil law, *periculi pretium*, and no person can be entitled to it who does not take upon himself the perils of the

(a) See the forms of both, Appendix to Abbott on Shipping.

(b) 3 V. & B. 135. 19 Ves. jun. 474. 2 Rose, 194 & 229.

voyage ; but it is not necessary that his doing so should be declared expressly, and in terms, though this is often done ; it is sufficient that the fact can be collected from the language of the instrument considered in all its parts. Hence, where the words were, “ I bind myself, my ship, and tackle to pay the sum borrowed with twelve per cent. bottomry premium, in eight days after my arrival at the port of London,” the Court were of opinion, that the words, “ my arrival ” must be understood to mean, my arrival with the ship, or the ship’s arrival. (c) But a total loss of the ship, within the meaning of a bottomry bond, cannot happen, if it exist in specie, although ever so much injured. (d)

2dly. *The amount of Interest.*—Upon a *bottomry* or *respondentia* contract, it is competent to the lender to receive any interest whatever. (e)

The terms *bottomry* and *respondentia* are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself ; as where a man lends a merchant 1000*l.* to be employed in a beneficial trade, on condition to be repaid with extraordinary interest, in case such a voyage be safely performed, which kind of agreement is called by some writers *fœnus nauticum*, and by others, *usura maritima* : but by stat. 19 G. 2. c. 37. money lent on bottomry or respondentia, on vessels belonging to his Majesty’s subjects, bound to or from the East Indies, must be lent only upon the ship or merchandize, with benefit of salvage to the lender ; (f) a previous statute, 7 G. 1. c. 21. having made void all contracts by his majesty’s

(c) *Simonds v. Hodgson*, 3 B. & Ad. 59. reversing decision in 6 Bingham 120.

(d) *Thompson v. R. E. A. Co.* 1 M. & S. 31.

(e) 2 Bl. Comm. 457.

(f) This statute also prevents the

borrower from recovering more on an insurance than the value of his interest, after deducting the sum borrowed ; and subjects him to repayment of any part which he has not laid out upon the ship or goods, even in case of a loss.

subjects on the loan of money by way of bottomry, on any ship *in the service of foreigners*, bound to the East Indies.

This contract is generally entered into, either by the owner, or the master, acting under an implied authority, as his agent. If it be made by the owners themselves, in this country, before the commencement of the voyage, the lender has not the same convenient and advantageous remedy by suit in the admiralty against the ship, as he has in the case of hypothecation for necessities by the master in a foreign port, and if the contract refer to a British ship, of which it purports to be an assignment, compliance with the provisions of the Registry Act seems necessary to its validity. (g) Neither does there seem to be any mode, by which a person who advances money at respondentia, on goods laden and to be laden, on board a ship, on an outward and homeward voyage, can entitle himself to resort for payment of his debt, to the specific goods that may be brought back. (h)

The authority of the master to hypothecate the ship and freight, in case of necessity, at a foreign port, is indisputable (i); and his hypothecation of the freight or cargo is also justifiable, if necessary. (k) The advantage of allowing the master to take up money on bottomry, consists in its enabling him to procure assistance when no other resource is at hand, and the adventure would be frustrated, if assistance were not afforded. Such being the reason for permitting him to borrow money on these terms, it follows, that he has no right to do so when he is at the owner's place of residence, and the means of communication with him are open, for then he has the owner to resort to. (l) And, with us, all England would,

(g) Abbott, 120. *Johnson v. Shippen*, 2 Ld. Raym. 983.

(h) Abbott, 121. 2 Bl. Comm. 458. *Busk v. Fearon*, 4 East. 319. *Glover v. Black*, 3 Burr. 1394.

(i) Moor 918. Hob. 11. Abb. 124.

(k) *The Gratitude*, 3 Rob. A. R. 240. *The Jacob*, 4 Rob. A. R. 245.

(l) Abbott, 123. *Molloy*, B. 2. c. 11. s. 11. *Lister v. Baxter*, 2 Stra. 695. See the *Rhadamanthe*, 1 Dodson. 201.; *The Barbara*, 4 Rob. A. R. 1. *La Ysabel*, 1 Dodson, 273.

at least before the commencement of the voyage, be considered the owner's residence, for this purpose, and so, perhaps, would Ireland since the union, (*m*) though before that period it was otherwise. (*n*) It follows also, that the master ought not to take up money on bottomry, even for a necessary purpose, if it can be procured on more moderate terms.

When the master, finding it absolutely necessary, for the purposes of the voyage, to obtain money, and being unable to obtain it in any other manner, executes an instrument of hypothecation, the effect of his contract is, to give the creditor, not indeed a property in the ship hypothecated, but a privilege or claim upon it, to be carried into effect by legal process. (*o*) And where the interest reserved exceeds, as it almost always does, the legal rate of 5 per cent., the owner cannot be made personally responsible, and the lender's remedy will be against the master or the ship; (*p*) though it would seem, that if the lender will content himself with 5 per cent., the master may pledge both the ship itself and the personal credit of the owner. (*q*)

It is no objection to the validity of a bottomry bond that it is given to the consignee of the cargo; the necessity for borrowing, and the fairness of the transaction, being established; (*r*) but the money must have been originally advanced upon the credit of the ship; if it be originally advanced on that of the owner, and such a bond be afterwards given, in consequence of doubt arising as to his responsibility, even before the ship leaves the place of advance, the bond will be invalid. (*s*) It is clear that the master cannot hypothecate the ship for any debt of his own; though if she really were in a state of want, and the money *bonâ fide* ad-

(*m*) Abbott, ubi supra. Rhadamanthe, 1 Dods. 201.

(*n*) Menetone v. Gibbons, 3 T. R. 267.

(*o*) Abbott, 122.

(*p*) Abbott. 125.

(*q*) Ibid. Sampson v. Bragington, 1 Ves. 443.

(*r*) Alexander Tate, 1 Dods. 278.

(*s*) The Augusta, 1 Dods. 283.

vanced to relieve her, his subsequent mis-application of it would not prejudice the lender's remedy. (t)

Where the ship has been hypothecated by the master in a foreign country, the lender has, as we have seen, a privilege or claim against the ship itself, of which he may avail himself as follows:—Upon the arrival of the ship in this country, if the loan be not repaid within the time prescribed, the agent of the lender applies to the Court of Admiralty, with the instrument of contract, and a proper affidavit of the facts, and obtains a warrant to arrest the ship, and cite all persons interested to appear before the court if they think proper to do so. — If, in the course of the proceedings, it becomes necessary to sell the ship, the Court decrees a sale to be made under the direction of its own commissioners, and afterwards distributes the proceeds among the different claimants, as justice requires; and this may be done if the owners or persons interested in the ship do not appear at the time appointed by the court, otherwise their absence or default would occasion a failure of justice. (u) As to the mode of distributing the proceeds among the several claimants, it is worthy of observation, that if securities of this sort are given at different periods of a voyage, and the value of the ship is insufficient to discharge them all, the last in point of date is entitled to priority of payment; because the last loan furnishes the means of preserving the ship, and without it the former lenders would have entirely lost their security. (w) In order, however, that this rule may apply, the security last in date must have arisen out of the destitute situation of the master, and his inability to obtain the necessary supplies for his vessel, on the personal credit of himself or his employers. (x)

(t) Abbott. 127, 128.

(u) Abbott. 127.

(w) Abbott. 128. *The Rhadamanthe*, Dods. 204.

(x) Abbott, ubi supr. *Rhadamanthe*.

CHAPTER VIII.

CONTRACTS OF HIRING AND SERVICE.

THE greater part of the law respecting the relation of master and servant, has been treated of in the First Book, under the head of *Principal and Agent*; for every servant is, in executing the duties required from him by his contract of service, his master's agent. The present chapter will, therefore, only contain a few remarks on the contract by which this relation is created.

Where the hiring is under a special agreement, the terms of that agreement must of course be observed. If there be no special agreement, but the hiring is a general one, without mention of time, it is considered to be for a year certain. If the servant continue in employment beyond that year, a contract for a second year is implied, and so on. (a) Indeed, in case of menial or domestic servants the contract is, by general custom, dissoluble by a month's warning, or payment of a month's wages. (b)

It follows from what is above stated, that if the master dismiss his servant, (hired generally,) without cause, the latter will have a right to wages up to the expiration of the year. (c) While, on the other hand, if the servant quit his master causelessly, he will, as it seems, be entitled to no wages. (d) Nor

(a) *Beeston v. Collyer*, 4 Bing. 389.
2 Inst. 42. *Huttman v. Bullnois*, 2 C.
& P. 510.

(b) See *Beeston v. Collyer*. *Robinson*
v. Hindman, 3 Esp. 235. 6 T. R. 326.

(c) See *Gandall v. Pontigny*, 4

Camp. 375. 1 Stark. 198. *Archard v.*
Horner, 3 C. & P. 349. *Eardley v.*
Price, 2 N. R. 333. Sed vide *Hulle v.*
Heightman, 2 East. 145.

(d) *Huttman v. Boulnois*, 2 C. & P.
510. *Com. Dig. Justices*, B. 63.

will he be so, if dismissed, before the expiration of his term of service, for misconduct. (e)

The master will be justified in taking this step by any exhibition of moral turpitude (f) on the part of the servant, *ex. gr.* an assault on a maid-servant, or the persuasion of an apprentice to elope; by a refusal to obey his lawful orders, (g) or the servant's unwarrantable absence from his duty, (h) even though involuntary, as, if he subject himself to imprisonment. (i) Though it is otherwise where the absence is warrantable, as, if it be for the purpose of having a severe hurt remedied. (k)

By stat. 1 & 2 W. 4. c. 37. in contracts of hiring made with artificers, workmen, labourers, or other persons employed in the trades specified in section 19 of that act, the wages must be made payable *in the current coin of this realm, and not otherwise.* The payment of such wages in any other mode is declared invalid. Nor is the employer allowed to set-off goods supplied to the artificer against the wages due to him. Obedience to this act is enforced by penalties. A payment in bank-notes with the artificer's consent is legalized by a proviso in section 8.

By stat. 55 G. 3. c. 154. a memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant is exempt from stamp duty.

A great number of statutes have at various times been passed, pointing out modes for the arrangement of disputes occurring between masters in particular trades and their servants, or workmen; the minute provisions of which it would be

(e) *Turner v. Robinson*, 6 C. & P. 15. *Atkin v. Acton*, 4 Carr & P. 208. *Callo v. Brouncker*, id. 518. See 1 M. & M. 489.

(f) *Atkin v. Acton*, 4 C. & P. 208. *Turner v. Robinson*, 6 C. & P. 15. *R. v. Brampton*, Cald. 11. *R. v. Welford*, Cald. 57. *Trotman v. Dunn*, 4 Camp. 212.

(g) *Spain v. Arnott*, 2 Stark. 250.

(h) *Robinson v. Hindman*, 3 Esp. 235.

(i) *R. v. Barton*, 2 M. & S. 329.

(k) *R. v. Sharrington*, 2 Bott's Poor Laws, by Const. 525. *R. v. Winterdatt*, Cald. 298. *Chandler v. Grieves*, 2 H. Bl. 606.

impossible, consistently with the plan of this treatise, to enumerate : the reader will find them collected in the last edition of Burn's Justice, under the head Servants. There is a general statute on this subject, viz. 5 G. 4. c. 96. entitled *An Act to consolidate and amend the laws relative to the arbitration of disputes between masters and workmen* ; the second section of which enumerates the causes of dispute intended to be embraced by its enactments, which apply to most complaints relative to the price of labour, hours of work, and quality of materials. The third section points out the mode of decision, which is either by the summary award of a justice, if the parties can agree to it; or if not, by two arbitrators, one chosen by each party, out of a number, of not less than four, nor more than six, to be named by the justice, upon application to him by one of the parties. The other sections provide for the appointment of new arbitrators, in case of the neglect or refusal of those first named ; the mode of investigation ; the powers with which the arbitrators are to be invested for the purpose of procuring evidence ; the course to be adopted where they disagree, and the enforcement of the award when made. It contains, besides, several provisions applicable to peculiar circumstances.

CHAPTER IX.

CONTRACTS WITH SEAMEN.

SECT. 1. *Nature and Form of Contract.*

2. *Duties and Rights of Seamen.*

3. *Wages, how lost or forfeited.*

4. *Remedies of Seaman for his Wages.*

SECTION I.—*Nature and Form of Contract.*

THE contract under which seamen in the merchant service are engaged, deserves a separate consideration on account of the peculiarities which distinguish it from other contracts of hiring and service. Seamen are usually engaged at a certain sum per month, or for the voyage, and stat. 2 G. 2. c. 36. s. 1., made perpetual by 2 G. 3. c. 31. enacts, that it shall not be lawful for any master or commander of any ship or vessel bound to parts beyond the seas, to carry any seaman or mariner, except his apprentice or apprentices, to sea, from any port or place where he or they were entered or shipped, to proceed on any voyage to parts beyond the sea, without first coming to an agreement or contract with such seaman or mariner for his wages; which agreement or agreements shall be made in writing, declaring what wages such seaman or mariner is to have respectively during the whole voyage, or for so long a time as he or they shall ship themselves for; and also to express in the said agreement or contract, the voyage for which each seaman or mariner, was shipped, to perform the same," under a penalty of £5. for each mariner carried to sea without such agreement, to be forfeited by the master to the use of Greenwich Hospital. This agreement is to be signed by

each mariner within three days after he shall have entered himself on board the ship, and is, when signed, conclusive and binding upon all parties ; (a) but that act does not apply to a British seaman entering on board a foreign ship in a British port. (b) Stat. 2 G. 3 c. 31. s. 2. extends these provisions to His Majesty's colonies in America. By stat. 31 G. 3. c. 39. s. 1 & 10., a similar agreement is required to be signed by the master and mariners of vessels of 100 tons and upwards, employed in the coasting trade from one port of Great Britain to another, and going to open sea. By that statute the contract is to specify *for what time, or for what voyage or voyages the mariner shall contract.*

Many stipulations, besides those required by the statute, are generally introduced into these contracts, but the court of Admiralty, in construing them, holds them "*conclusive and binding*" only as to the two points mentioned in the statute, viz. *the wages* and *the voyage*, and will consider how far the other engagements are reasonable, or the reverse. (c) The voyage must be accurately described, and if the master introduce general words, such as "To New South Wales, or elsewhere," he will not be allowed to reap advantage from them. (d)

Statute 37 G. 3. c. 73. relates to vessels trading to the West Indies, gives a form for the agreement with the mariners, (e) imposes a forfeiture on seamen deserting, and masters of other vessels receiving them, and restrains the amount of wages allowed to be given. (f)

It is to be observed, that these statutes do not enact that a verbal agreement shall be void, but impose a penalty upon the master, if a written agreement be not made. When a written

(a) 5 G. 2. c. 36. s. 2.

Home, ubi supra. Eliza, 1 Hagg. 182.

(b) Dickman v. Benson, 3 Camp.

Countess of Harcourt, id. 248.

290.

(e) This form is in common use for

(c) The Minerva, 1 Hagg. 347. The

other voyages also.

George Home, id. 377. ad finem.

(f) See Rodgers v. Lacy, 2 B. & P.

(d) The Minerva, supra. The George

57.

agreement is made, it is the only evidence of the contract; no new term can be introduced by parol. (g)

SECTION II.—*Duties and Rights of Seaman under the Contract.*

The duty of a seaman under this contract is to exert himself *to the utmost* in the service of the ship; and therefore any promise of extra pay, as an inducement to extraordinary exertion, is *nudum pactum*, and void. (h) On the other hand, he will have a right to his full wages, although prevented, by a hurt received in the performance of his duty, or by sickness, from performing his service; (i) and, if he remain with the ship, he has a right to wages during an embargo, provided that she afterwards perform her voyage, and earn freight. (k) A seaman entering or impressed into the King's service, does not forfeit the wages or prize-money which he had previously earned, but will have a right to a rateable portion of wages up to the time of quitting the merchant vessel, which right is liable to be defeated, in the same way as if he had remained on board, *ex. gr.* by capture. (l) It appears also, that if he die during his voyage, his representatives may claim *pro ratâ*. (m)

With respect to the *time* for payment of the wages; it is enacted, (n) that no master or owners shall pay or advance to any seaman during the time he shall be in parts beyond the

(g) *White v. Wilson*, 2 B. & P. 116. *Isabella*, 2 Rob. A. R. 241. *Elsworth v. Woolmore*, Abb. on Shipping, 440.

(h) *Harris v. Watson*, Peake, 72. *Stilk v. Myrick*, 2 Camp. 317. See *Thompson v. Havelock*, 1 Camp. 527.

(i) *Abbott*, 442. *Chandler v. Grieves*, 2 H. Bl. 606. n. a.

(k) *Beale v. Thompson*, 3 B. & P. 405. 4 East. 546. *Johnson v. Broderick*, 4 East. 566.

(l) *Wiggins v. Ingleton*, 2 L. Raym. 1211. *Clements v. Mayborn*, Abbott. 444. *Paul v. Eden*, *ibid.* Anon. 2 Camp. 320. note. Stat. 2 G. 2. c. 36. s. 13.

(m) *Armstrong v. Smith*, 1 N. R. 299. *Cutter v. Powell*, 6 T. R. 320.

(n) 8 G. 1. c. 24. s. 7. made perpetual by 2 G. 2. c. 28, s. 7. See 12 G. 2. c. 30. s. 12.

sea, any money or effects, exceeding a moiety of his wages, which shall be due at the time of such payment; and imposes a penalty for disobedience. It is further enacted, as to ships engaged in foreign voyages, that the masters shall pay the seamen their wages, if demanded, in thirty days after the ship's entry at the Custom House, except in cases where a covenant shall have been entered into to the contrary, or at the time the seaman shall be discharged, which shall first happen, if demanded; deducting the penalties and forfeitures imposed by the act. (o)

As to vessels employed in the *coasting* trade, the master is to pay the wages, if demanded, within five days after the ship shall be entered at the Custom House, or the cargo be delivered, or at the time the seamen shall be discharged, which shall first happen; unless an agreement shall have been made to the contrary, in which case the wages shall be paid according to such agreement; deducting in every case the penalties imposed by this act. (p)

SECTION III.—*Wages, how Lost or Forfeited.*

The wages of seamen, whether hired by the voyage or the month, are sometimes *lost*, and sometimes *forfeited*. *Freight* is said to be *the mother of wages*; (q) and, if, during the voyage, a total loss or capture of the ship take place, the seamen lose their wages. (r) But if there be an outward and a homeward voyage, they will be entitled to wages for the former, if the ship were lost during the latter; unless the two were by agreement consolidated into one; (s) for then no freight would have

(o) 2 G. 2. c. 36. s. 7.

(p) 31 G. 3. c. 39. s. 5.

(q) There are some exceptions to this doctrine. See *Neptune*, 1 Hagg. 227.

(r) *Abbott*, 457. *Appleby v. Dods*,

8 East, 300. *Abernethy v. Landale*,

Dougl. 539. 1 Sid. 179. *Hernaman v.*

Bawden, 3 Burr. 1844.

(s) *Anon.* 1 Ld. Raym. 639. 12

Mod. 408. 2 Magens. 113.

been earned. So if there be several cargoes and several voyages, they have a right to wages up to the conclusion of the last. And if money have been advanced to the owner in part of freight, they have a right to wages *pro ratâ* out of that, although the vessel have been wrecked before the termination of the voyage. (t) If, in case of a wreck, the cargo be saved, and the merchant pay part of the freight in respect thereof, the seamen seem both on principle and authority entitled to part of their wages. (u) And it was held, where by great labour they had saved part of the ship, that they were entitled to wages out of the produce. (w) But, it is said, that if the ship were not seaworthy, and the voyage discontinued on that account, the seamen's remedy is not for wages, but by a special action for the breach of contract. (x) He seems entitled to his wages, subject, perhaps, to a deduction for salvage, in case of capture and recapture. (y)

According to the doctrine of the common law, (z) which has been affirmed and extended by many enactments of the legislature, (a) desertion from the ship forfeits the seaman's wages. By the last of these statutes, (b) the forfeiture of a seaman deserting from a registered ship during its absence from the kingdom, contrary to his agreement, is extended, to whatever wages may be due to him, from the owner of the ship, in whose service he has been engaged in the voyage back to this country; and desertion from a British ship in the West

(t) Anon. 2 Shower, 283. See Saunders v. Drew, 3 B. & Adol. 450.

(u) Abb. 451.

(w) Neptune, 1 Hagg. 227.

(x) Eaken v. Thom, 5 Esp. 6.

(y) Bergstrom v. Mills, 3 Esp. 36. Sed vide Chandler v. Meade, cited 2 L. Raym. 1211. See The Friends, 4 Rob. 143. And Beale v. Thompson, 4 East, 546.

(z) The Baltic Merchant, 1 Edw. 86.

Molloy, B. 2. c. 3. s. 10. Bulmer, 1 Haggard, 163. See Eliza, id. 182. Countess of Harcourt, id. 248. Pearl, 5 Rob. 224. Neave v. Pratt, 2 N.R. 408.

(a) 11 & 12 W. 3. c. 7. s. 17. 2 G. 2. c. 36. s. 3. made perpetual by 2 G. 3. c. 31. 31 G. 3. c. 39. s. 3 & 4. relating to the coasting trade. 37 G. 3. c. 73. s. 1. relating to West India traders. 4 G. 4. c. 25. s. 9.

(b) 4 G. 4. c. 25. s. 9.

Indies, is punished by forfeiture of all the wages for the voyage made in the ship which he enters, immediately after such desertion. (c) A forfeiture of wages may, of course, be waived by the party entitled to take advantage of it. (d) Quitting the ship with leave of the master, and refusing to return when ordered, is desertion; (e) but, quitting the ship, and refusing to proceed on a voyage not designated by the articles, is not so; (f) nor is a man a deserter who has been compelled to quit the ship by inhuman treatment, or dismissed without lawful cause. (g)

The articles of agreement generally stipulate that the seamen shall not go on board any other vessel, or be on shore without leave, and shall, in default, be liable to the penalties of stat. 2 G. 2. c. 36. and 37 G. 3. c. 73. This stipulation is merely referable to the statute, and does not create a forfeiture where the statute has not inflicted one, as in case of leaving the vessel after her arrival at her port of discharge, though before she is moored. (h) This case is specially provided for by 2 G. 2. c. 36. s. 6. which subject seamen, leaving the ship, without a discharge in writing, to a forfeiture of one month's pay, to the use of Greenwich Hospital. The same act authorises the master, to deduct all forfeitures imposed thereby, from the wages, and enter them in a book, signed by himself, and two or more principal officers, (i) provisions which must be strictly followed. (k) In all cases, a seaman who wilfully absents himself from the ship without leave, forfeits to the use of Greenwich Hospital two days pay for each day's absence. (l)

Neglect or refusal to assist the master in his defence against

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| (c) 37 G. 3. c. 73. s. 1. | (g) <i>Limland v. Stephens</i> , 3 Esp. 269. |
| (d) <i>Miller v. Brant</i> , 2 Camp. 590. | <i>Sigard v. Roberts</i> , 3 Esp. 72. |
| (e) <i>Bulmer</i> , 1 Hagg. 163. <i>Pearl</i> ,
5 Rob. 224. | (h) <i>Frontine v. Frost</i> , 3 B. & P. 302. |
| (f) <i>Eliza</i> , 1 Hagg. 182. <i>Countess of</i>
<i>Harcourt</i> , ib. 168. | (i) Sect. 9. |
| | (k) <i>Frontine v. Frost</i> , ubi supra. |
| | (l) 2 G. 2. c. 36. s. 5. 31 G. 3.
c. 39. s. 4. |

pirates, forfeits the wages; (*m*) and so, it seems, does a justifiable discharge for gross misconduct. (*n*) And, if the cargo be embezzled or injured by the fraud or negligence of the seamen, the owner has a right to deduct a compensation from the wages of those whose misconduct has produced the injury; (*o*) but he has no right, either at common law, or by virtue of the provision commonly introduced into the agreement, (*p*) to make any deduction on that account from the wages of the innocent. (*q*)

SECTION IV.—*Remedies of Seaman for his Wages.*

It only remains to state the remedies which the law has provided for the recovery of seamen's wages. If the hiring be on the usual terms, and made by words, or by writing only, and not by deed; the seamen, or any one or more of them, and every officer, except the master, may sue in the Court of Admiralty, and may by the process of that Court, arrest the ship as security for their demand, or, cite the master or owners personally, to answer them; (*r*) and that, not only for the wages earned during the voyage, but for those earned in fitting the ship out, if the owners will not afterwards despatch it; (*s*) the same remedy is, generally speaking, open to foreign seamen, whose claim is founded on the maritime law. (*t*) And where the seamen thus proceed against the ship, their claim is preferred to all other

(*m*) 22 & 23 Car. 2. c. 11. s. 7.

(*n*) *Robinet v. The Ship Exeter*, 2 Rob. 261.

(*o*) *Molloy, B.* 2. c. 3. s. 9. 2 Shower, 167. 1 L. Raym. 650.

(*p*) Vide *Abbott*, Appx. V.

(*q*) *Thompson v. Collins*, 1 N. R. 347.

(*r*) *Abbott*, 476. citing as to the seamen, *Winch*. 8. *Alleson v. March*, 2 Vent. 181. *Anon.* 3 Mod. 379. *Benna*

v. Parr, 2 L. Raym. 1206. *The Boatswain, King v. Ragg*, 2 Str. 858. 1 Barnard. 297. *The Carpenter, Wheeler v. Thompson*, 1 Str. 707. *The Surgeon, Sayer*, 136. *The Mate, Bayley v. Grant*, 1 L. Raym. 632. *Salk.* 33. *Read v. Chapman*, 2 Str. 937.

(*s*) *Wells v. Osman*, 2 Ld. Raym. 1044. 6 Mod. 238. *Mills v. Gregory, Sayer*, 127.

(*t*) *Abbott*, 477.

charges on her, since, to their labour alone, is her preservation and existence attributable. (*u*)

If the agreement be by deed, or contain special terms, the seaman's remedy is by action in the courts of common law; (*w*) which remedy is also open to him, in cases where the Admiralty has jurisdiction, and is the only one to which the master can have recourse, (*x*) if he fail to reimburse himself, as he may, out of the ship's freight and earnings. But, whether the party sue, in the Court of Admiralty, or at law, the suit must be commenced within six years, except in case of disability. (*y*) The seaman has a right to sue either the master or the owners; and whenever it becomes necessary to produce the agreement in Court, it lies on them, not upon him, to do so. (*z*)

By stat. 59 G. 3. c. 58. s. 1. authority is given to justices of the peace, on the complaint of any person who has served on board any vessel trading from England to parts beyond the seas, and where the sum in question does not exceed 20*l.* to summon the masters or owners, and order payment, and cause the amount to be levied by distress and sale of the goods, of the party, or of the vessel, its tackle, and furniture. The act gives an appeal to the Court of Admiralty; seems to provide against the seaman's depriving himself of its benefit; casts the burthen of producing the contract on the master and owners, and reserves all pre-existing remedies. It is continued by stat. 3 & 4 W. 4. c. 88. for seven years from the 28th August, 1833, and from thence to the end of the then next session of Parliament.

(*u*) Favorite, 2 Rob. 232.

(*w*) See Abbott, 480. 2 Dodson's A. R. p. 12. Opy *v.* Child, Salk. 31. Day *v.* Searle, Abbott, 481. Howe *v.* Nappier, 4 Burr. 1944. Vide Abbott, 483. and Menetone *v.* Gibbons, 3 T. R. 207. and Buck *v.* Attwood, 2 Str. 761.

(*x*) Read *v.* Chapman, 2 Str. 937. Favorite, 2 Rob. 232. Ragg *v.* King,

2 Str. 858. Clay *v.* Sudgrave, Sal. 33.

1 Ld. Raym. 576. 12 Mod. 405. Carth. 518.

(*y*) Stat. 4 Anne, c. 16. s. 17, 18, 19. 21 Jac. 1. c. 16. s. 3. 7.

(*z*) 31 G. 3. c. 39. s. 6. 2 G. 2. c. 36. s. 8. Bowman *v.* Manzleman, 2 Camp. 315.

CHAPTER X.

GUARANTIES.

SECT. 1. *Nature and form of Contract.*2. *Surety, how far liable.*3. *Surety, how discharged.*4. *Surety, how indemnified.*SECTION I.—*Nature and Form of Contract.*

A GUARANTY, is a promise, to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is himself, in the first instance, liable to such payment or performance. (*a*)

By stat. 29 C. 2. c. 3. s. 4., “No action shall be brought, to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.” This section prevents a *verbal* guaranty from binding; though, it is to be observed, that if money have been paid in pursuance of it, that money cannot be recovered back: (*b*) and though no action can be

(*a*) Fell on Guaranties, p. 1. A mere offer to guarantee is insufficient until accepted. *M'Iver v. Richardson*, 1 M. & S. 557. *Symonds v. Want*, 2 Stark. 371. *Gaunt v. Hill*, 1 Stark. 110. See *Coleman v. Upcot*, 5 Vin. 527. *Bird v. Blosse*, 2 Vent. 361. *Hodgson v.*

Hutchinson, 5 Vin. 522. On the question whether a *del credere* contract be a guaranty within the Statute of Frauds, see ante, Book I. c. 3. p. 52.

(*b*) *Shaw v. Woodcock*, 7 B. & C. 73. See *Griffith v. Young*, 12 East. 513.

brought upon a guaranty which does not satisfy the provisions of the statute, yet, the Court will enforce it against an attorney who has undertaken to pay his client's debt and costs, by virtue of their summary jurisdiction over their own officers; (c) and, if a party admit that he has made a binding guaranty, by paying money into Court, on a count charging him with it, that renders proof of a written instrument unnecessary; (d) but it is otherwise, if he do an act, which merely admits that an agreement was made, without admitting that such a one was made as would be binding under the statute. (e)

As conformity to the provisions of the statute is thus requisite, it will be proper to consider them separately.

No action shall be brought, to charge the defendant, upon any special promise, to answer, for the debt, default, or miscarriage of another.

In order that a contract may fall within these terms, it is essential that it should be for the payment or performance of something *for which another person is liable*; since, if no other person be liable, the contract is not "to answer *for the debt, default, or miscarriage of another.*" For instance, where A., in consideration that B. would not sue J. S., promised to pay the money due from J. S., this was held to be within the statute; (f) for J. S. was liable to the payment of his debt, before, and after, A.'s promise, which, therefore, was, strictly, "*to answer for the debt of J. S.*" But, where it was agreed, between A., his creditors, and one J. S., that J. S. should pay the creditors ten shillings in the pound, to be received by them in full satisfaction, and that they should assign their debts to

(c) *Evans v. Duncan*, 1 Tyrwh, 283.
Senior v. Butt, Hill. 1827. K. B. and
Payne v. Johnson, Trin. 1787. Exch.
 there cited.

(d) *Middleton v. Brewer*, Peake, 15.
 See Prec. in Chan. 208. 353. 374.

(e) *Rondeau v. Wyatt*, 2 H. Bl. 66.

(f) *Rothery v. Curry*, B. N. P. 281.
 Accord. *Kirkham v. Martyr*, 2 B. & A.
 613. *Fish v. Hutchinson*, 2 Wils. 94.
Winckworth v. Mills, 2 Esp. 484.
Thomson v. Bond, 1 Camp. 4. Exp.
Adney, Cowp. 460.

J. S.; this contract was held not within the statute; because J. S. had not contracted to *pay* the debts of A., but to *purchase* them from A.'s creditors, and would, after such purchase, have a right to use the names of the creditors, in order to recover the debts from A. (g) So, where the defendant, in consideration that the plaintiff would discharge out of custody a person whom he had taken on a *ca. sa.* promised to pay the debt on a certain day, or render that person, the Court held the promise not within the statute, because the debt was gone by the discharge of the debtor out of custody. (h)

If C. be A.'s debtor, and B.'s creditor, an agreement by B., to pay his debt to A., in discharge of C.'s liability, is not within the statute. (i) But, *quære*, if the debt from B. to C. had been contingent at the time of making such agreement. (k)

A distinction was once taken, between a promise to pay for goods, &c. for another, *before* and *after* delivery; (l) but this is over-ruled, and it is now clear that, if the person for whose use the goods are furnished, is liable at all; any promise by a third person, on sufficient consideration, to pay that debt, must be in writing. (m) In a word, the question by which it must be tested, whether a contract be or be not within the statute, is, *What is the promise?* is it a promise to answer for the debt, default, or miscarriage, of another, for which that other remains liable? if so, it must be in writing. (n)

The reader must, however, be apprized, that it has been

(g) *Anstey v. Marden*, 1 N. R. 124. *Stephens v. Squire*, 5 Mod. 205. See *Read v. Nash*, 1 Wils. 305. Sed *quære*, whether that case be now law; and see 1 Wms. Saund. 211. b. n. i. *Harris v. Huntbach*, 1 Burr. 373. *Castling v. Aubert*, 2 East. 325. *Thomas v. Cook*, 8 B. & C. 728. *Adams v. Dansey*, 6 Bingh. 510. *Howes v. Martin*, 1 Esp. 162.

(h) *Goodman v. Chase*, 1 B. & A. 297. See *Browning v. Stallard*, 1 Taunt. 450.

(i) *Wilson v. Coupland*, 5 B. & A. 228.

(k) See *Perkins v. Moravia*, 1 C. & P. 376. There seems no rational distinction between the two cases.

(l) Cowp. 228. *Jones v. Cooper*.

(m) *Matson v. Wharham*, 2 T. R. 80. *Anderson v. Hayman*, 1 H. B. 120. *Birkmyr v. Durnell*, 1 Salk. 27. 2 Lord Raym. 1085.

(n) 1 Wms. Saund. 211. to 211. c.

thought to follow from some of the decisions, (o) that a man may bind himself to pay another's debt, by a parol promise, founded on a new consideration. This idea has been controverted, and the cases cited in the margin explained, and reconciled to the rule as above stated, in an elaborate note, 1 Wms. Saund. 211. c. n. i., where it is contended, that the nature of the consideration cannot affect the terms of the promise itself, unless, as in *Goodman v. Chase*, it be an extinguishment of the liability of the original party; and, indeed, in *Edwards v. Kelly* above cited, the Judges all professed to decide, on the ground, that the promise there, was not to pay the debt of another.

Where A. has been concerned in inducing a tradesman to deliver goods to B. it often becomes a question, whether the goods must be looked upon as actually *sold* to A., though delivered to B., or whether they must be considered as sold to B., A becoming a surety for the price; in the former case, A. would be liable as a principal, and the contract would not fall within the statute; in the latter, A. would be liable only as surety, and only on a written guaranty. To decide this question, *to whom was credit given?* is the province of a jury, who are to take into their consideration all the circumstances of the case. (p) If, upon notice given to the plaintiff to produce his books, it appear that the credit was not originally given to A.; that is strong, though not conclusive evidence, that he is but a surety. (q)

It has been laid down, that a parol promise, to pay the debt of another, and also do some other thing, is void altoget-

(o) *Holditch v. Milne*, 3 Esp. 86.
Williams v. Leaper, 2 Wilson, 308.
 3 Burr. 1886, recognized in *Castling v. Aubert*, 2 East. 325. *Edwards v. Kelly*, 6 M. & S. 204. *Bampton v. Paulen*, 4 Bingham. 264. See, however, *Thomas v.*

Williams, 10 B. & C. 664. See Starkie on Ev. 2nd Edit. vol. ii. 347.

(p) *Keate v. Temple*, 1 B. & P. 158.
Darnall v. Trott, 2 C. & P. 82. *Storr v. Scott*, 6 C. & P. 244.

(q) *Keate v. Temple*, ubi supra. *Croft v. Smalwood*, 1 Esp. 121.

ther; (r) this seems, however, to hold good, in those cases only, in which the parts of the contract are so blended together that they cannot be separated. (s)

Unless the Agreement, &c.—The term *agreement* comprehends, *contracting parties*, a *consideration*, and a *promise*; all these must, therefore, appear in the writing. (t) It is, however, sufficient, if the consideration can be gathered from the whole tenor of the writing; and there is a material difference in this respect between prospective and retrospective agreements; the former being much more easily supportable; thus, where the instrument was as follows:

To Mr. John Newbury.

SIR,

I, the under-signed do hereby agree to bind myself to be security to you for S. Corcoran, late in the employ of J. Pearson, of London Wall, for whatever you may entrust him with while in your employ, to the amount of £50., in case of any default to make the same good.

11 March, 1828.

W. ARMSTRONG.

It was objected that no consideration for Armstrong's promise appeared upon this guaranty; but the court held otherwise; and Tindal, C. J. said, "*The words are all prospective*; it may fairly be implied, that Corcoran had left one service, and that the guaranty was given in consideration of his being taken into another." (u) So where the guaranty was, "I guarantee the payment of any goods which A. shall deliver to

(r) *Chater v. Beckett*, 7 T. R. 201.
Thomas v. Williams, 10 B. & C. 664.

(s) *Wood v. Benson*, 2 Tyrwh. 97.

(t) *Wain v. Warlters*, 5 East. 10.
Jenkins v. Reynolds, 3 B. & B. 14.

Saunders v. Wakefield, 4 B. & A. 595.
 1 Wms. Saund. 211. in notis.

(u) *Newbury v. Armstrong*, 6 Bingh. 201.

B.," this was held sufficient. (*w*) Here too, the agreement was prospective, it contemplated a *future* delivery of goods to B. But where the instrument was,

" *Messrs Wain & Co.*

" I will engage to pay you, by half-past four this day, fifty-six pounds, and expenses, on bill, that amount, on Hall.

" JOHN WALTERS."

This was held insufficient. (*x*) Here the agreement was clearly *retrospective*, Walters engaging to guarantee a debt *already* contracted on the bill. But where the agreement is *retrospective*, and refers to a *past* consideration, which it, however, states to have been *moved by an antecedent request*, from the guarantor, there it will be sufficient; (*y*) for such a consideration would be sufficient, at common law, to support a promise, and the statute of Frauds has made no alteration whatever with regard to the sufficiency of the consideration, but only requires that it should be in writing. (*z*)

Though parties, promise, and consideration, must appear,

(*w*) *Stapp v. Lill*, 1 Camp. 242. 9 East. 348, accord. *Russell v. Moseley*, 3 B. & B. 211. *Morris v. Stacey*, Holt, N. P. C. 153. *Ryde v. Curtis*, 8 D. & R. 62. *Exp. Gardom*, 15 Ves. 287. *Combe v. Woolf*, 8 Bingham. 157. In *Boehm v. Campbell*, 8 Taunt. 639. and *Pace v. March*, 1 Bingham. 216. the court held the agreements prospective and good within the statute: that construction, however, seems unsustainable, and those two cases are not at present to be relied on. See *Morley v. Boothby*, 3 Bingham. 113.

(*x*) *Wain v. Warlters*, 5 East. 10.

Accord. *Saunders v. Wakefield*, 4 B. & A. 596. *Jenkins v. Reynolds*, 3 B. & B. 14. *Morley v. Boothby*, 3 Bingham. 107. *Lyon v. Lamb*, Append. to Fell on Guaranties. *Whitcomb v. Lees*, 5 Bingham. 34. *Cole v. Dyer*, 1 C. & J. 461. 1 Tyrwh. 307. *Wood v. Benson*, 2 Tyrwh. 98.

(*y*) *Payne v. Wilson*, 7 B. & C. 423. *Stead v. Liddard*, 1 Bingham. 196. *Coe v. Duffield*, 7 B. M. 252.

(*z*) See *Rann v. Hughes*, 7 Bro. P. C. 556. 7 T. R. 350. n. a. *Reech v. Kennegal*, 1 Ves. 126. *Hawkes v. Saunders*, Cowp. 289.

the *amount* of the debt guaranteed need not be mentioned. (a)

Or some memorandum or note thereof, &c.—Under this, as well as under the 17th, section, the contract may be collected from several distinct papers, provided they can be sufficiently connected without oral testimony; (b) and as the writing is necessary to *evidence* the contract, not to *constitute* it, the memorandum need not have been delivered to the party relying on it; therefore, a letter from a man, to his own agent, or to any one else, setting out the agreement, is sufficient. (c)

Signed by the party to be charged, or some other person, thereunto, by him, lawfully authorized.—See the remarks upon the corresponding words in the 17th section, post. Ch. 11. *Contracts of Sale.*

A signature, by the party, as a witness, to the instrument containing or referring to the agreement, is sufficient, if, when he signed, he was aware of the contents. (d) It is immaterial at what part of the instrument the signature is placed, whether at the beginning or end. (e) It is sufficient if it be signed by the party *to be charged*, though it be not signed by the other contracting party. (f)

It is, in some cases, necessary, that a guaranty should be

(a) Bateman v. Phillips, 15 East. 272.

(b) Tawney v. Crowther, 1 Bro. C. C. 161. 318. Clinan v. Cook, Sch. & Lef. 22. Brodie v. St. Paul, 1 Ves. jun. 326. Kain v. Old, 2 B. & C. 627. See Evans on Statutes, vol. i. p. 237. and post. Chapter 11. *Contracts of Sale.*

(c) Per Lord Hardwicke, 3 Atk. 503. 2 Cha. R. 147. 1 Vern. 110. Bateman v. Phillips, 15 East. 272.

Longfellow v. Williams, Peake's Add. Ca. 225.

(d) 1 Wils. 118. 1 Ves. 6. 3 Atk. 502.

(e) Ogilvie v. Foljambe, 3 Meriv. 62. Selby v. Selby, ib. 6. Knight v. Crockford, 1 Esp. 189. Right v. Price, Doug. 241.

(f) 3 Bro. C. C. 161. 318. Str. 236. 1 P. Wms. 618. Hutton v. Gray, 2 Ch. Ca. 164. Seton v. Slade, 7 Ves. 265. Knight v. Crockford, 1 Esp. 190.

stamped. Stat. 55 G. 3. c. 184. imposes a duty on agreements, the subject matter whereof is of the value of 20*l.* or upwards; to this there are, however, exceptions, particularly of agreements for the sale of goods. Contracts of guaranty are within both provisions: where the principal contract would require a stamp, so does the guaranty, and *vice versa*. (g)

SECTION II.—*Surety, how far liable.*

The extent of the surety's liability depends, of course, on the peculiar construction of each guaranty. A contract to guarantee the payment of "any debt A. B. may contract in his business as jeweller, not exceeding one hundred pounds, after this date," is a contract, which renders the guarantor answerable for any debts, not exceeding 100*l.*, which A. B. may *from time to time* contract in the way of his business. (h) Such a contract is called *a continuing guaranty*. Disputes frequently arise, whether an instrument fall within this description or not. (i) The best rule on the subject seems to be that laid down by Lord Ellenborough, viz. that "if a party mean to confine his liability to a single dealing, he should take care to say so."

In *Simpson v. Manley*, (k) it was held by the court of Exchequer, that the words, "if you give A. credit we will be responsible," were not equivalent to saying, "if you give him *the credit usual in your trade*," viz. that of grocers. In *Combe v. Woolfe*, (l) the guaranty was,

(g) *Warrington v. Furber*, 8 East. 242. *Watkins v. Vince*, 2 Stark. 368.

(h) *Merle v. Wells*, 2 Camp. 413. *Accord. Mason v. Pritchard*, 12 East. 227. *Bastow v. Bennett*, 3 Camp. 220. *Hargreave v. Smee*, 6 Bingh. 224. *Simpson v. Manly*, 2 Tyrwh. 86. *Allan v. Kenning*, 9 Bingh. 618.

(i) For instances in which the guaranty has been confined to a single

transaction, vide *Melville v. Hayden*, 3 B. & A. 593. *Kay v. Groves*, 6 Bingh. 276. *Nicholson v. Paget*, 1 Cr. & Mee, 54, in which last case, the court expressed itself averse to extending the rule of construction against guarantors.

(k) 2 Tyrwh. 86. vide *Samuel v. Howarth*, 3 Meriv. 372.

(l) 8 Bingh. 156.

“ *Messrs. C. D. & Co.*

I hereby guarantee and engage to see you paid for any porter you may send Mr. A. B. of this town, until you receive notice to the contrary from me. L. W.”

The custom of the plaintiffs was to give six months' credit, and then sometimes to take a bill at two ; having given A. B. eleven months' credit, it was held, that they thereby discharged the surety.

SECTION III.—*Surety, how discharged.*

If the creditor discharge the principal, or enter into any agreement with him, by which the surety's situation is altered for the worse, or which would render a proceeding against the surety a fraud upon the principal, he discharges the surety : for instance, if he agree to give time to the principal ; for then, if he forbear proceeding during the time given, he wrongs the surety, by prolonging his responsibility ; while, on the other hand, if he proceed against the surety, he gives him a remedy over against the principal, and thus exposes the latter to proceedings, contrary to the faith of his agreement. (*m*) So, if he substitute a new agreement instead of that for the performance of which the surety was responsible. (*n*) But the surety will not be discharged by mere forbearance, (*o*) nor by acceptance of a collateral security, (*p*) nor if he himself have agreed to the indulgence given the principal. (*q*)

(*m*) *Combe v. Woolfe*, ubi sup. *Jones v. Lewis*, 4 B. & C. 506. *Hawkshaw v. Perkins*, 2 Swanst. 539. *Rees v. Berrington*, 2 Ves. jun. 540. *Low v. E. I. Co.* 4 Ves. jun. 824. *Nisbet v. Smith*, 2 Bro. C. C. 579. *Ex parte Smith*, 3 Bro. C. C. 1. *Ex parte Gifford*, 6 Ves. 805. *Boulton v. Stubbs*, 18 Ves. 20. *Ex parte Glendinning*, Buck. 517.

See the notes to *Jones v. Lewis*.

(*n*) *Whitcher v. Hall*, 5 B. & C. 269. *Eyre v. Bartrop*, 3 Madd. 221.

(*o*) *Orme v. Young*, Holt. 84. *Goring v. Edmonds*, 6 Bingh. 94.

(*p*) *Twopenny v. Young*, 3 B. & C. 208.

(*q*) *Tyson v. Cox*, 1 Turner 395. *Maltby v. Carstairs*, 7 B. & C. 735.

Where a surety has entered into a bond, for payment in default of the principal debtor, and, by a parol agreement, time has been given to the principal debtor, the surety is compelled to resort to a court of equity ; because, by the rules of law, a parol agreement cannot be pleaded in discharge of an instrument under seal. (*r*)

If the creditor omit to perform any condition, express or implied, imposed upon him by the guaranty, the surety will, of course, not be liable. (*s*) And fraud—for instance, the concealment, of some material part of the principal's original contract, from the surety—vitiates and avoids his engagement. (*t*) It is said by Mr Starkie to have been decided that a continuing guaranty is countermandable by parol. (*u*) And the executor, it seems, is not liable, in respect of advances made after the testator's death, which operates as a revocation. (*w*)

SECT. V.—*Surety, how indemnified.*

As soon as the surety's obligation to pay is become absolute, he has a right to apply to equity to be exonerated by his principal. (*x*) But this he cannot do, till he is under actual liability. (*y*)

(*r*) Per Tindal C. J., in *Combe v. Woolfe*. See *Davey v. Prendergrass*, 5 B. & A. 187. *Prendergrass v. Davy*, 6 Madd. 124. *Rees v. Berrington*, 2 Ves. jun. 540. See *Trent Nav. Co. v. Harley*, 10 East. 34. *Bulsteel v. Jarrold*, 8 Price 467.

(*s*) *Glyn v. Hertel*, 8 Taunt. 208. *Bacon v. Chesney*, 1 Stark. N. P. C. 192. per Lord Ellenborough. *Holl v. Hadley*, 5 Bingh. 54. *Evans v. Whyte*, 5 Bingh. 485. *Bulkely v. Lord*, 2 Stark. 400. *Elworthy v. Maunder*, 5 Bingh. 295..

(*t*) *Pidcock v. Bishop*, 3 B. & C. 605.

(*u*) Starkie on Evidence, 2d ed. vol. 2. p. 371. n. n. *Brocklebank v. Moore*. See *Goss v. Lord Nugent*, 5 B. & Adol. 66.

(*w*) *Potts v. Ward*, 1 Marsh. 366. See *Cooper v. Johnson*, 2 B & A. 394. *Kinguel v. Knapman*, Cro. Eliz. 10. *Joyner v. Vyner*, T. Raym. 415.

(*x*) Per L. C. in *Nisbet v. Smith*, 2 Bro. C. C. 579. per M. R. in *Lee v. Rook*, Mos. 318. See *Ranelagh v. Hayes*, 1 Ves. 190. *Antrobus v. Davidson*, 3 Meriv. 578. *Cox v. Tyson*, 1 T. & R. 395.

(*y*) See *Cock v. Ravie*, 6 Ves. 283.

After he has paid the debt of his principal, he may obtain reimbursement at law ; (z) and has a right, in equity, to have any fund, which was charged with the principal debt, applied for his indemnification. (a) Nay, it appears, that if the surety be under a disability, which prevents him from obtaining, in his own person, the benefit of securities which have been set apart for the creditor, equity will restrain the creditor from proceeding against the surety, till he has resorted to those securities ; (b) though such circumstances would furnish no defence at law. (c) And where the principal has assigned his effects to a trustee for his creditors, a creditor who has a guaranty, will be forced, even at law, to apply in discharge thereof, a rateable part of any payment he may receive from the trustee. (d)

As the surety has a right to reimbursement, from his principal, *in toto*, so he has from his co-sureties *pro tanto* ; this latter right is called the right to *contribution*, and is recognised both in law and equity, with this distinction, that, at law, a surety is, in every case, entitled to contribution from his co-sureties, in proportion to their number ; without regard to the insolvency of any one of them, which, equity, on the contrary, regards. Thus, if A. B. and C. be co-sureties, A. having paid the debt, would be entitled to recover *at law* a third only from B., though C. may have become insolvent ; (e) whereas, *in equity*, he will be entitled to one half. (f) But both in law and equity, if he have been reimbursed in part, the contribu-

(z) Warrington v. Furber, 8 East. 242.

(a) See Wright v. Morley, 11 Ves. 12. Harrison v. Glossop, Coop. 61. See for the qualification of this doctrine in case of a bond, Copis v. Middleton, 1 Turn. 224. See Robinson v. Wilson, 2 Madd. 435. Dowbiggan v. Bourne, Young 111.

(b) Wright v. Nutt, 3 Bro. C. C. 326.

1 H. Bl. 137. Cottin v. Blane, 2 Anst. 544. Wright v. Simpson, 1 Ves. 728.

(c) Folliott v. Ogden, 1 H. Bl. 124.

(d) Bardwell v. Lydall, 7 Bingh. 489.

(e) Cowell v. Edwards, 2 B. & P. 268. Browne v. Lee, 6 B. & C. 697.

(f) Peter v. Rich, 1 Cha. Rep. 19. Holt v. Harrison, 1 Cha. Ca. 246. Layer v. Nelson, 1 Vern. 456.

tion must be calculated on the residue. (g) And, it is said, that where one surety becomes so at the instance of another, that other cannot call on him for contribution. (h)

The right to contribution equally exists whether the sureties were engaged, jointly or severally, in one instrument, or in several instruments, and whether they knew of each other's engagements or not; for, in all these cases alike, a payment by one is a benefit to all. (i) But any surety may, of course, by using words to that effect, so modify his contract, that he will be liable, only in default of previous sureties, who will then be entitled to no contribution from him. (k)

(g) *Knight v. Hughes*, 3 C. & P. 467.
1 M. & M. 247. *Roach v. Thompson*,
id. 487. *Swain v. Wall*, 1 Cha. Rep. 80.

(h) *Turner v. Davies*, 2 Esp. 478.
See *Thomas v. Cook*, 8 B. & C. 728.
In *Turner v. Davies*, the surety who in-
duced the other to join, had taken a bill

of sale from the principal for his own se-
curity.

(i) *Deering v. Winchelsea*, 2 B. & P.
270. See the Judgment in *Craythorne v.*
Swinburne, 14 Ves. 160.

(k) *Craythorne v. Swinburne*, 14
Ves. 160.

CHAPTER XI.

CONTRACTS OF SALE.

SECT. 1. *Ability of Vendor to sell.*

2. *Form and Requisites of Contract.*

3. *Duties of Vendor.*

4. *Duties of Vendee.*

5. *Effect of Illegality.*

IN considering this subject, we will touch successively upon the following topics :—

1. The ability of the vendor to sell.
2. The form and requisites of the contract of sale.
3. The duties it imposes on the vendor.
4. Those which it imposes on the vendee.
5. The effect of illegality upon the contract.

SECTION I.—*Ability of Vendor to Sell.*

Where a man has in himself the property of goods, the general rule is, that he may dispose of them to whomever and however he pleases; provided that judgment have not been obtained against him, and the writ of execution actually delivered to the sheriff, for then the goods are bound to answer the debt from the time of delivering the writ to the sheriff, as they formerly were from the *teste* thereof. (a) A valid sale, however, may be made of them in market overt, even after the delivery of the writ to the sheriff. (b)

Where a man has not in himself the property of goods but only

(a) St. 29. Car. 2. c. 3. 2 Bl. Comm. 446.

Tonkins. Barnard, 42. S. C. Eq. Ca. Ab. 381.

(b) Per L. Hardwicke. Lowthal v.

the possession, as, if he be a thief or finder, he nevertheless may make a valid sale, so that the buyer will be secure of his purchase; provided that such sale be made *in market overt*, during the usual market hours. This *market overt*, in the country, is only held on special days provided for particular places by charter or prescription; but in the City of London, every day, except Sunday, is market day; the market place or spot of ground, set apart by custom for the sale of particular goods, is, also, in the country, the only *market overt*; but in London, every shop in which goods are exposed publicly to sale is *market overt*, but for such things only as the owner professes to trade in. (c)

There are some cases in which even a sale in market overt will not secure the purchaser; as, if the goods were the property of the King, or have been wrongfully sold to any pawnbroker in London, or within two miles thereof; (d) or if the buyer knew they were not the seller's, or was guilty of any other fraud in the transaction; nor do the privileges of a market overt embrace sales made in a *coverte* place within its limits, as in a back room or warehouse, or in a shop, whose windows are closed up; (e) nor sales between sunsetting and sunrising; (f) nor cases in which the treaty for sale was begun out of market overt; (g) neither does the rule respecting sales in market overt extend to gifts (h) or pawns (i) there; and notwithstanding any intervening sales, if the original vendor, who sold without having the property, come again into possession of the goods, the original owner's right to them will revive. (k) And although, in general, a sale in market overt will secure the purchaser, though the goods purchased

(c) Bl. Comm. 449. Wilkinson, v. King, 2 Camp. 336.

(d) 1 Jac. 1. c. 21.

(e) 2 Inst. 713. 5 Rep. 836. Poph. 84. 2 Rolls Ab. Tit. Market Overt, 50. p. 122.

(f) 2 Inst. 714.

(g) 2 Inst. 713.

(h) 2 Inst. 713.

(i) Hartop v. Hoare, Str. 1187. 1

Wils. 8. 3 Atk. 44. Packer v. Gillies, 2 Camp. 336.

(k) 2 Bl. Comm. 450.

have been stolen, yet, stat. 7 & 8 G. 4. cap. 29. sect. 57. (l) enacts, that if any person, guilty of any such felony or misdemeanor as is before mentioned in that act, in stealing, taking, obtaining, or converting, or in knowingly receiving, any chattel, money, valuable security, or other property whatsoever, shall be indicted by, or on behalf of the owner, his executor or administrator, and convicted, *in such case the property shall be restored* to the owner, or his representative, and the court *shall have power* to award writs of restitution, or to order restitution in a summary manner. But this does not extend to charge a person who purchased the goods in *market overt* after the felony, and disposed of them again before the conviction. (m) Moreover the statute provides "that if it shall appear, before any award or order made, that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bonâ fide* taken or received by transfer or delivery for a just and valuable consideration, without any notice or cause to suspect that the same had been stolen, taken, obtained, or converted, as aforesaid; in such case *the court shall not award or order* the restitution of such security." There are some very peculiar provisions with respect to the sale of horses in *market overt*, enacted by st. 2 P. & M. c. 7. and 31 Eliz. c. 12.

An agent or a person in possession of certain documents generally used as symbols of property, is in many cases able to make a valid sale of the goods of another by the provisions of st. 6 G. 4. c. 94. which are set out at length and commented upon in a preceding chapter. (n)

Negotiable instruments are also an exception to the general rule, that a valid sale cannot be made, except in *market*

(l) 21 H. 8. c. 11. was the corresponding statute, but only extended to felonies. See *Parker v. Patrick*, 5 T. R. 175.

(m) *Horwood v. Smith*, 2 T. R. 750.

(n) *Ante*, B. 1. c. 8. p. 63.

overt, of property to which the vendor has no right: the nature of these, and their transferability, has already been discussed in Book II. p. 110. to which the reader is referred.

SECTION II.—*Form and Requisites of a Contract of Sale.*

A sale of goods must either be by *deed* or *parol*. A sale by deed is not at present very usual, except in cases where the vendor wishes to convey his entire property to the vendee, or where the sheriff sells under an execution. Where such a deed, which is denominated a *bill of sale*, is executed, the property in the goods conveyed by it passes out of the vendor into the vendee, by its delivery. (o)

A *parol* sale of goods, might, according to the common law, have been in every instance effected, either by an agreement to be completed *in presenti*, coupled with *tender*, *part-payment*, or a delivery of part of the goods by way of *earnest*; or, by an agreement to be completed *in futuro*, without any of these ceremonies. (p) Thus if A. agreed to pay so much for goods, and B., the owner, had agreed to take it, this was an agreement to be completed *in presenti*, since by its terms it contemplated an immediate performance on both sides; and if no more had passed, but the parties had separated, this agreement would have become void and unavailable; (q) such separation being equivalent to a mutual consent to rescind it. But if B. had tendered the goods, or A. the price, (r) or B. had received any part of the price though but a penny, or A. any, even the very smallest portion of the goods, (s) both

(o) Noy's Max. c. 42. Com. Dig. Biens, D. 3.

(p) Com. Dig. Agreement, B. 3. and the other authorities cited by Holroyd, J. in *Tarling v. Baxter*, 6 B. & C. 362. See *Dunmore v. Taylor*, Peake, 41. et notas.

(q) Lutw. 252. Dyer, fo. 30. pl. 203. 14 H. 8. 22. 2 Bl. Comm. 447.

(r) 2 Comm. 447. 8 Sheppard's Touchstone, 225.

(s) 2 Bl. 448. Noy, c. 42. See *Hinde v. Whitehouse*, 7 East. 571. Sheppard's Touchstone, 224.

would have been bound to their bargain ; though B. would in no case have had a right to the remainder of the price, until he was himself ready to deliver the goods to A., and A. no right to the possession of the goods, till he was ready to pay the whole of the price to B. (t)

It was quite clear, that, after a payment or tender of the entire price, the property of the goods became vested in the vendee, so that he might, if the vendor had refused to deliver them, have maintained trover, and would have had to bear the loss, had he of his own will permitted them to remain in the vendor's hands, and they had there been accidentally destroyed. (u) But it does not seem so clear, whether the effect of part payment or earnest, be, to bind the bargain, *and* alter the property, or merely to bind the bargain. (x) In *Langford v. Tiler*, Salk. 113. the rule was said to be ; " after earnest given, the vendor cannot sell the goods to another without default in the vendee, and therefore if the vendee do not come and pay for, and take away, the goods, the vendor ought to go and request him, and then if he do not come and pay for, and take away, the goods, in a convenient time, the agreement is dissolved, and the vendor is at liberty to sell them to any other person." This rule, which certainly is the more convenient, seems to have been approved by Lord Ellenborough, in *Hinde v. Whitehouse*, 7 East. 558, and his Lordship appears to have considered all the authorities as reconcileable, and to have understood the effect of them to be, that after earnest, and before the payment of the whole price, the property is in the vendee, subject only to the vendor's *lien*, but that the vendor may, upon finding the vendee delay to accomplish his bargain, go to him and request him to do

(t) Hob. 41. 2 Bl. Comm. 448. 448. See *Tarling v. Baxter*, 6 B. & C. 360. *Hinde v. Whitehouse*, 7 East. 558. *Peeters v. Opie*, 2 Saund. 352 b. in notis. See *Bach v. Owen*, 5 T. R. 409. *Rawson v. Johnson*, 1 East. 203.

(x) See *Noy's Max.* 88. *Sheppard's Touch.* 224. *Bach v. Owen*, 5 T. R. 409. *B. N. P.* 50.

(u) *Shepp. Touch.* 225. 2 Bl. Comm.

so, and if he, after that, delay for an unreasonable time, may treat such further delay as equivalent to a consent to rescind the sale, and the property will thereupon become revested in himself.

An agreement to be completed *in futuro* may be such, either, on account of the postponement of the time for payment of the price, or for the delivery of the goods, or of both: in all these cases the rule is, that, *if nothing remains to be done on the part of the seller, as between him and the buyer, before the goods purchased are to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller.* (y) But that if any act remains to be done on the part of the seller, then the property does not pass until that act has been done. (z) Thus, where there was a bargain for the sale of hay, which was not to be paid for till a future period, and not to be cut till paid for, it was held that the property nevertheless passed to the vendee, and that, the hay having, before the day of payment, been accidentally destroyed, the loss must fall upon him. (a) But the property in a chattel does not pass by a contract of sale, even though the value be paid, unless it be in existence at the time of the contract; (b) though it may be appropriated, while in the course of making, by special circumstances evidencing such an intention. (c) And where the goods sold are part of a larger stock, and a separation is necessary previous to delivery, no property passes till the separation is complete; (d) to use the

(y) Per Holroyd, J. in *Tarling v. Baxter*, 6 B. & C. 364. See B. N. P. 50. *Phillimore v. Barry*, 1 Camp. 513. *Elmore v. Stone*, 1 Taunt. 458. Noy's Max. 42. Hob. 442. *Goode v. Langley*, 7 B. & C. 26. *Atkinson v. Bell*, 8 B. & C. 277.

(z) *Hanson v. Meyer*, 6 East. 614. *Zagury v. Furnell*, 2 Camp. 240. *Withers v. Lys*, 4 Camp. 237. *Wallace v. Breeds*, 13 East. 522. *Simmons v. Swift*, 5 B. & C. 864. (c) *Woods v. Russell*, 5 B. & A. 942. (d) *White v. Wilkes*, 5 Taunt. 178. *Austen v. Craven*, 4 Taunt. 644. *Shepley v. Davis*, 5 Taunt. 617. *Busk v. Davis*, 2 M. & S. 397. and *quare* whether *Whitehouse v. Frost*, 12 East. 614.

(a) *Tarling v. Baxter*, 6 B. & C. 364. be law.

(b) *Mucklow v. Mangles*, 1 Taunt.

words of Bayley, J. in *Rhodes v. Thwaites*, 6 B. & C. 392. "where a man sells part of a large parcel of goods, and it is at his option to select part for the vendee; he cannot maintain any action for goods bargained and sold until he has made that selection. But as soon as he appropriates part for the benefit of the vendee, the property of the article sold passes to the vendee, although the vendor is not bound to part with the possession until he is paid the price."

Such was the common law respecting sales of personal property: and such is still the law respecting sales of goods *under the value of 10l.*, with this addition, that no action can be maintained on any agreement for the sale of them, that is not to be performed within the space of one year from the making thereof, unless the agreement be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. (e)

On this provision it has been decided, that an agreement is valid, though not in writing, if it possibly could be performed within the year. (f) Thus, a contract to deliver goods at the return of a particular ship, would not be within the meaning of this section, for the ship might possibly return within a year, and though it should, in point of fact, remain abroad for five years, that would make no difference.

It was hinted in two cases, (g) and has been at last decided, that this section of the statute of frauds does not require an agreement to be in writing, one part of which is to be performed within a year and the other not. (h)

(e) 29 Car. 2. c. 3. s. 4.

(f) Anon. Sal. 280. *Peter v. Compton*, Skinn. 353. *Fenton v. Emblers*, 3 Burr. 1281. *Wells v. Horton*, 4 Bingh. 40.

(g) *Boydell v. Drummond*, 11 East. 142. *Bracegirdle v. Heald*, 1 B. & A. 722.

(h) *Donnellan v. Read*, 3 B. & Ad.

399. *Hoby v. Roebuck*, 7 Taunt. 157. 2 Marsh. 433. acc. Yet in some of the older cases, *ex. gr.* *Peter v. Compton*, the contrary seems to have been assumed; and see *Birch v. E. of Liverpool*, 9 B. & C. 392, which was not cited in *Donnellan v. Read*. The word *agreement*, in the same section, has been frequently construed to mean all that is to be done

With respect to contracts for the sale of goods of *the value of 10l., and upwards*; they, besides being within the section of the statute of frauds just commented upon, are also governed by the seventeenth section, which enacts that “no contract, for the sale of any goods, wares, and merchandizes, for the price of 10l. or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents, thereunto lawfully authorised.”

We will detain the reader for a short time, to consider, one by one, the parts of this important section.

No contract for the sale of any goods, wares, and merchandizes.—A distinction was formerly taken, between cases in which the thing contracted for was in existence and capable of delivery at the time of the contract, and cases in which it was necessary, that something should be done, in order to render it capable of delivery; the former cases were universally allowed to be within the act, but the decisions, on the question whether the latter were so, are not very consistent. (i) However, by stat. 9 G. 4. c. 14. s. 7. it is enacted, that the seventeenth section of the statute of frauds, shall extend to all contracts for the sale of goods to the value of 10l., sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of

on *both sides*, a meaning which Donnellan *v.* Read denies to it. See Wain *v.* Warlters, 5 East. 10. Saunders *v.* Wakefield, 4 B. & A. 595. Jenkins *v.* Reynolds, 3 B. & B. 14. See further on this section of the statute, Chapter on Guaranties.

(i) See Rondeau *v.* Wyatt, 2 H. B.

63. Garbutt *v.* Watson, 5 B. & A. 613. Smith *v.* Surman, 9 B. & C. 568. Cooper *v.* Elston, 7 T. R. 14. Alexander *v.* Comber, 1 H. B. 20. Clayton *v.* Andrews, 4 Burr. 2101. Groves *v.* Buck, 3 M. & S. 178. Watts *v.* Freend, 10 B. & C. 446.

such contract, be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery. It has been doubted whether a sale of stock be within this section of the statute of frauds, the better opinion seems to be that it is. (k) However, a contract for shares in a canal navigation, or similar public undertaking, is not so; (l) nor is a contract to procure goods and carry them. (m) It appears certain that sales by auction are, though that was once doubted. (n)

Except the buyer shall accept part of the goods so sold, and actually receive the same. — In consequence of these words, there has, ever since the act, been a great struggle to determine what is a part-performance, a delivery, an acceptance, or a part-payment. Upon these points, the inclination of the courts is, to give the words of the statute full effect, and not to allow, unnecessarily, of constructive deliveries and acceptances. Indeed, if goods be ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount; (o) for instance, by the delivery of the key of the warehouse in which goods are lodged, or of some other indicia of property; or there may be a delivery, by the vendee's dealing, and the vendor's suffering him to deal, with goods, as with his own property. (p)

A few examples may assist the reader in determining what

(k) *Pickering v. Appleby*, 2 P. Wms. 307. *Prec. Cha.* 533. *Ca. tem. King*, 41.

(l) *Latham v. Barber*, 6 T. R. 67.

(m) *Cobbold v. Caston*, 1 Bingham 399.

(n) *Simon v. Motivos*, Bl. 599. *Hinde v. Whitehouse*, 7 East. 558. *Heyman v. Neale*, 2 Camp. 337, 12 Ves. J. 466. *Kenworthy v. Scholfield*, 2 B. & C. 955. *Shelton v. Livius*, 2 Tyrwh. 434. *Bird v. Boulter*, 4 B. & Ad. 444.

(o) *Searle v. Keys*, 2 Esp. 598, 1 Atk.

171. *Peckerly v. Appleby*, Com. 354.

Colt v. Nethersoll, 2 P. Wms. 308.

Zwinger v. Samuda, 7 Taunt. 265. *Lucas*

v. Dorrein, 7 Taunt. 278.

(p) *Chaplin v. Rogers*, 1 East. 192.

Simon v. Motivos, 3 Burr. 1921. *Anderson v. Scott*, and *Hodgson v. Le Bret*,

1 Camp. 233, et notas.

will, and what will not, amount to a delivery and acceptance within the meaning of this section.

Where a hogshead of wine in the warehouse of the London Dock Company, was *verbally* sold, and a delivery order given to the vendee, the acceptance of the delivery order, by the vendee, was held to be no acceptance of the wine: (q) "there could not," said the Court, "be any actual acceptance by the vendee, until the Dock Company accepted the order for delivery, and thereby assented to hold the wine as the agents of the vendee." (r) A transfer of a horse, by order of the vendee, from the vendor's sale stable into another of his stables, has been held sufficient. (s) But where a horse was sold by verbal contract, no time fixed for the payment of the price, and the horse was to remain with the vendors for twenty days, without any charge to the vendee, at the expiration of which time it was sent to grass, by the direction of the vendee, and at his desire entered as the horse of one of the vendors; it was held that there was no acceptance (t) of the horse by the vendee. Acceptance of a sample which is to be accounted part of the commodity sold is sufficient, (u) though acceptance of one which is to be no part thereof, is not so. (w) There cannot be such an actual acceptance as the statute contemplates, so long, as, the buyer continues to have a right to object to the quantum or quality of the goods, (x) or the

(q) *Bentall v. Burn*, 3 B. & C. 423. See *Lowe v. Palmer*, 3 B. & A. 321. *Baldey v. Parker*, 2 B. & C. 37. *Talver v. West*, Holt, N. P. C. 178. *Thompson v. Maceroni*, 3 B. & C. 1; but *quære* if this case were decided with any view to the statute of frauds.

(r) See *Gosling v. Birnie*, 7 Bingh. 339.

(s) *Elmore v. Stone*, 1 Taunt. 458.

(t) *Carter v. Toussaint*, 5 B. & A. 855. See *Tempest v. Fitzgerald*, 3 B. & A. 680. *Howe v. Palmer*, 3 B. & A.

321. *Hanson v. Armitage*, 5 B. & A. 559. *Phillips v. Bistolli*, 2 B. & C. 511. *Price v. Lea*, 1 B. & C. 156. *Maberly v. Sheppard*, 10 Bing. 99.

(u) *Hinde v. Whitehouse*, 7 East. 558. *Kilnitz v. Surrey*, 5 Esp. 267.

(w) *Talver v. West*, Holt, N. P. C. 178.

(x) *Acebal v. Levy*, 10 Bingh. 384. *Howe v. Palmer*, *ubi supra*. *Hanson v. Armitage*, 5 B. & A. 557. *Kent v. Huskisson*, 3 B. & P. 233. *Ansley v. Emery*, 4 M. & S. 262.

seller retains his lien for the price upon the property accepted. (y) Delivery to an agent or carrier, appointed by the vendee, or by whom he has been in the habit of receiving goods from the vendor, is sufficient. (z)

It is said that the acceptance necessary to satisfy the statute of frauds, is different from such a one as will enable the vendor to maintain an action for goods *sold and delivered*. (a) In *Boulter v. Arnott*, goods were sold for ready money, and packed up at the vendor's house, in boxes furnished by the purchaser, who saw the packing, and requested the seller to keep them for him till he should call; it was held that the vendor could not, under the circumstances, maintain an action for goods *sold and delivered*; but Lord Lyndhurst thought, that, had there been a count for goods *bargained and sold*, he might have recovered. (b)

(y) *Baldey v. Parker*, 2 B. & C. 37.
Carter v. Toussaint, 5 B. & A. 855.
Tempest v. Fitzgerald, 3 B. & A. 680.
 See *Maberley v. Sheppard*, 10 Bing. 99.

(z) *Hart v. Sattley*, 3 Camp. 528.
 See *Dutton v. Solomonson*, 3 B. & P. 583.
Dawes v. Peck, 8 T. R. 330.
 The vendor himself may be the vendee's agent for this purpose, *Elmore v. Stone*, 1 Taunt. 458.

(a) *Boulter v. Arnott*, 3 Tyrwh. 269.
Goodall v. Skelton, 2 H. B. 316. See vide the Judgment in *Maberley v. Sheppard*, 10 Bing. 99.

(b) Yet the lien of the vendor appears not to have been determined, either in this case or in *Goodall v. Skelton*, and it has been laid down, that while it exists, there can be no acceptance within the statute. See the cases cited in note (y) supra. There seems, upon the whole, to be some difficulty on this subject. In *Hodgson v. Le Bret*, 1 Camp. 233, the action is stated to have been for goods *sold and delivered*, in which shape it

seems, from *Boulter v. Arnott*, that it could not at present be maintained; and indeed, Bayley B. remarks, that Lord Ellenborough, in *Hodgson v. Le Bret*, held that there was sufficient evidence, not of a *delivery*, but of an acceptance within the meaning of the statute. In *Thompson v. Maceroni*, 3 B. & C. 1, the opinion expressed by the Court that there had been no acceptance within the 17th section of the statute of frauds, was unnecessary to the decision of the question in that case, which was, whether, under the circumstances, the vendor could maintain an action for goods *sold and delivered*; and indeed, seems scarce consistent with the facts, of the vendee having actually received part of the goods, and of the vendor having recovered a verdict with damages to the full value of the whole, upon a special count for not delivering a bill in payment for all. The report of the case is an extremely meagre one.

Or give something, in earnest to bind the bargain, or in part payment.—If a purchaser of goods draw the edge of a shilling over the hand of the vendor, and return the money into his own pocket, which in the north of England is called *striking a bargain*, that will not be sufficient. (c)

Or that some note or memorandum in writing of the bargain be made.—It is sufficient if the contract can be collected from several different documents, provided they be sufficiently connected in sense. (d) But this connection must appear from the documents themselves, and not be introduced by parol evidence. (e) The word *bargain*, used in this section, does not render so strict a statement of the transaction necessary as the word *agreement*, used in the fourth, of matters within that section. (f) But the note must express *the names of both the contracting parties*, and as it seems, the *price*. (g) The contract, though it must be evidenced in writing, may be rescinded by parol, and it has even been held that a substitution of other days for those on which the goods were to be delivered, may be made and evidenced by parol, (h) a decision which has, however, been somewhat reflected on.

And signed by the parties to be charged.—The appearance of the vendor's name printed in a bill of parcels is, it seems, a sufficient signature to bind him. (i) If the note commence

(c) *Blenkinsop v. Clayton*, 7 Taunt. 597.

(d) *Cobbold v. Caston*, 1 Bingham 399. *Phillimore v. Barry*, 1 Camp. 513. *Jackson v. Lowe*, 1 Bingham 9. *Saunderson v. Jackson*, 2 B. & P. 238. *Allen v. Bennet*, 3 Taunt. 169. Vide *Cooper v. Smith*, 15 East. 103. *Richards v. Porter*, 6 B. & C. 437. See ante, *Guaranties*, p. 283.

(e) *Boydell v. Drummond*, 11 East. 142.

(f) Per Lord Ellenborough, *Egerton v. Matthews*, 1 East. 307.

(g) *Elmore v. Kingscote*, 5 B. & C. 583. *Kain v. Old*, 2 B. & C. 627. *Champion v. Plummer*, 1 N. R. 252. See *Acebal v. Levy*, 10 Bingham 383.

(h) *Cuff v. Penn*, 1 M. & S. 21. See *Warren v. Stagg*, cited in *Littler v. Hollands*, 3 T. R. 591. *Thresh v. Rake*, 1 Esp. 93; but see the remarks of the Court in *Goss v. Lord Nugent*, 5 B. & Adol. 67, and see *Snowball v. Verain*, Bunb. 175.

(i) *Saunderson v. Jackson*, 2 B. & P. 238. *Schneider v. Norris*, 2 M. & S. 286. per Lord Eldon, C. J. 2 B. & P. 239.

with "*I, A. B. agree to sell,*" that is a sufficient signature by A. B., (k) and as the statute only requires the signature of the parties *to be charged*, a memorandum signed by the vendor, has been held sufficient to bind him, though it was not signed by the vendee ; against whom, therefore, the contract could not have been enforced. (l)

Or their agents, thereunto lawfully authorized.—The authority need not be in writing, (m) and a subsequent recognition by the principal is sufficient evidence of its having been given. (n) But it has been held, that one of the contracting parties cannot be the agent of the other for this purpose. (o) This decision seems to be somewhat regretted ; and though it has been held that an auctioneer's signature of the defendant's name, by his authority, is insufficient to entitle the auctioneer to sue upon the contract in his own name, yet it is settled, that a signature by the auctioneer's clerk, is sufficient for that purpose. (p)

But, though the auctioneer, suing in his own name on the contract of sale, cannot avail himself of his character of agent for the defendant ; yet, in all other cases, he is looked on as the lawfully authorized agent of both parties, (q) the seller communicating his authority by giving him directions to sell ; and the buyer, to whom the conditions of sale, pasted on the auctioneer's box, are sufficient notice of the terms thereof, (r) by bidding aloud. And if the auctioneer or auctioneer's

(k) Knight *v.* Crockford, 1 Esp. 190.
Eyre, C. J.

(l) Allen *v.* Bennett, 3 Taunt. 169.
See Rowe *v.* Osborne, 1 Stark. 140.

(m) Rucker *v.* Cammeyer, 1 Esp. 106. Chapman *v.* Partridge, 5 Esp. 256.

(n) Maclean *v.* Dunn, 4 Bingh. 722.
Kinnitz *v.* Surry, Paley, 5th ed. Soames
v. Spencer, 1 D. & R. 32.

(o) Wright *v.* Dannah, 2 Camp. 203.

Farebrother *v.* Simmons, 5 B. & A. 333.
Cooper *v.* Smith, 15 East. 103. Rayner
v. Linthorn, 1 R. & M. 325. See ante,
Book 1. cap. 3 sect. 1. p. 44.

(p) Bird *v.* Boulter, 4 B. & Ad. 443.

(q) See Bird *v.* Boulter, *ubi supra*.
Hinde *v.* Whitehouse, 7 East. 558.
Emerson *v.* Heelis, 2 Taunt. 38. Shel-
ton *v.* Livius, 2 Tyrwh. 436-7. Simon
v. Motivos, Bl. 599.

(r) Mesnard *v.* Aldridge, 3 Esp. 271.

clerk (*s*) write down the purchaser's name in the sale book, opposite the lot for which he is the highest bidder, that is a sufficient signature within the statute, and binds the purchaser, (*t*) who, perhaps may, at any time before such entry, retract his authority, as he certainly may before the fall of the hammer. (*u*) But if the signature be on a mere catalogue of the articles, neither connected with, nor referring to, the conditions of the sale, it will not be a memorandum of a sale on those conditions, unless it can be connected with them by some other written document. (*w*)

A *broker* also is the agent of both parties within this section. (*x*) The mode, in which he binds his principals *inter se*, is by the delivery of bought and sold notes, which notes constitute the bargain, and are the proper evidence thereof, (*y*) provided always, that they correspond. (*z*) It was once held that the entry which the broker makes in his book was the original contract, and the bought and sold notes merely copies of it. (*a*) But that doctrine seems to be over-ruled, (*b*) and it seems settled that the bought and sold notes, though generally copied from the entry, are the contract; though if there

(*s*) *Bird v. Boulter*, supra. Where this is done by the clerk, he does not, it would seem, act as a mere automaton in the auctioneer's hand, but as a distinct agent authorized by the parties to make entries.

(*t*) *Emerson v. Heelis*, 2 Taunt. 38. *Hinde v. Whitehouse*, 7 East. 558. *Bird v. Boulter*, 4 B. & Ad. 443. *Shelton v. Livius*, 2 Tyrwh. 436.

(*u*) *Payne v. Cave*, 3 T. R. 148.

(*w*) *Phillimore v. Barry*, 1 Camp. 513.

(*x*) See ante, B. 1. cap. 3. pp. 45. 62. 65.

Simon v. Motivos, 1 Bl. 599. *Rucker v. Cammeyer*, 1 Esp. 105. *Hinde v. Whitehouse*, 7 East. 569.

(*y*) *Thornton v. Meux*, 1 M. & M. 43. *Cumming v. Roebuck*, 1 Holt. 172. *Goom v. Affalo*, 6 B. & C. 117. *Short v. Spackman*, 2 B. & Ad. 962. *Hinde v. Whitehouse*, 7 East. 559. *Blagden v. Bradbear*, 12 Ves. 466. 472. *Buckmaster v. Harrop*, 13 Ves. 456. *Dickenson v. Lilwall*, 1 Stark. 128.

(*z*) *Thornton v. Meux*, ubi supra. *Grant v. Fletcher*, 5 B. & C. 436. *Thornton v. Kempster*, 1 Marsh. 55. *Cumming v. Roebuck*, ubi supra.

(*a*) *Heyman v. Neale*, 3 Camp. 337.

(*b*) *Thornton v. Meux*, ubi supra. *Cumming v. Roebuck*, 1 Holt. 172. *Goom v. Affalo*, 6 B. & C. 117. See *Short v. Spackman*, 2 B. & Ad. 962.

were no bought and sold notes, the entry, if signed, would perhaps be sufficient (c) to bind the parties.

The bought and sold notes being the contract, it has been considered to follow, that, if they do not correspond, the intended contract will not be effected; (d) and that if they be altered in any material point, without the consent of the party sought to be charged, it will as against him be avoided. (e) But a mistake in both notes as to the seller's name, will not vitiate the contract, if it cannot be shewn that any one was prejudiced thereby; (f) and it has been held that a vendee is bound by a note, signed by him, and delivered by the vendor to the broker, though differing from the note sent to the vendee. (g)

We have now discussed the form and requisites of a contract of sale. Next in order is the consideration of the duties it imposes, first, on the vendor; and secondly, on the vendee.

SECTION III.—*Duties of Vendor.*

The duties of the vendor are, to deliver the goods, at the time, and in the manner, stipulated for in the contract, and to comply with any warranty, expressed or implied therein, on his part.

Delivery of Goods.—The vendor must deliver the goods as soon as the vendee has performed all conditions precedent on his part, and may, if he refuse to do so, be sued either specially, for non-performance of his contract, or in trover, for the goods themselves.

(c) *Grant v. Fletcher*, 5 B. & C. 436.

(d) *Thornton v. Kempster*, 1 Marsh. 355. *Thornton v. Meux*, 1 M. & M. 43. *Grant v. Fletcher*, 5 B. & C. 436.

Cumming v. Roebuck, Holt, 172. per Gibbs, C. J.

(e) *Powell v. Divett*, 15 East. 29.

(f) *Mitchell v. Lapage*, Holt, 253.

(g) *Rowe v. Osborne*, 1 Stark. 140.

See *Allen v. Bennett*, 3 Taunt. 169.

In the absence of special stipulation, the condition precedent upon the vendee's part, is *readiness to pay the price*. (h) And of this readiness to pay, a demand of the goods, even though made by a servant, is *primâ facie* evidence. (i) If the goods were to be paid for by a bill, the vendee ought to tender one; (k) but the word *bill* will not be held to mean *approved bill*. (l)

If an *approved bill* be stipulated for, that means a bill to which no reasonable objection can be made. (m)

There are some cases, indeed, in which the vendor may be obliged to deliver up the goods, without payment, or tender of the price: these are,

First, where, by special agreement between the parties, the day of payment is to be subsequent to that of delivery; in other words, where the goods are sold on credit. Yet even in such case, though the vendee has a right to possession (n) without payment, or tender of the price; yet that right is not indefeasible, and will be defeated, if he become insolvent before he has actually taken possession. (o)

Secondly, where the vendor has done that which amounts to delivery of the goods, (p) *ex. gr.* has made a *symbolical* transfer of property, which is, by its nature, (q) unfit to be deliver-

(h) Rawson v. Johnson, 2 East. 203. See Peeters v. Opie, 2 Wms. Saund. 352 a. in notis; and see Bordenave v. Gregory, 5 East. 107. as to a transfer of stock.

(i) Squier v. Hunt, 3 Price, 68. Wilkes v. Atkinson, 1 Marsh. 412. See Peeters v. Opie, in notis. Levy v. L. Herbert, 7 Taunt. 310. 1 Moore, 51.

(k) Hodgson v. Davies, 2 Camp. 530. On the effect of payment by bill, vide post Chap. 12. on Contracts of Debt, and see Bunney v. Poyntz, 4 B. & Ad. 570.

(l) Ibid.

(m) Ibid. See Adams v. Richards, 2

H. B. 573. Thursby v. Helbot, 3 Mod. 273.

(n) Shepp. Touchstone, 224. Vide Kew v. Swain, 1 Dans. & Lloyd, 193.

(o) Bloxam v. Sanders, 4 B. & C. 948.

(p) Slubey v. Heyward, 2 H. B. 504. Hammond v. Anderson, 1 N. R. 69. Green v. Haythorne, 1 Stark. 447.

(q) Manton v. More, 7 T. R. 67. See Hibbert v. Carter, 1 T. R. 745. Lemprière v. Pasley, 2 T. R. 485. Zwinger v. Samuda, 7 Taunt. 265. Lucas v. Dorrein, 7 Taunt. 278.

ed otherwise, as for instance, by giving up to the vendee the key of the warehouse where it is deposited, (r) or receiving warehouse rent for it from the vendee, (s) or giving a delivery order to the wharfinger in whose possession it is, to which order the wharfinger has signified his assent, (t) or where he has done any act which would determine his right to stop *in transitu*. (u) But it must be observed, that the converse of this last proposition is not true, for many acts will be sufficient to divest the vendor's lien for his price, which will not be sufficient to hinder him from stopping the goods *in transitu*, if the vendee should become insolvent. For instance, delivery of goods to an agent of the vendee appointed to convey them to him, deprives the vendor of his lien for the price; but not of his right to stop the goods *in transitu*, in case of the vendee's failure before they have reached him. (w) A delivery of part of the goods, where there is no intention of separating that part from the whole, divests both the lien and the right to stop *in transitu*; (x) but it is otherwise where there is such an intention. (y)

The vendor may, of course, avoid the sale, by shewing fraud in the vendee, *ex. gr.* that he deterred others from bidding by his representations. (z)

2dly. *Compliance with Warranties*.—The vendor must strictly

(r) *Ellis v. Hunt*, 3 T. R. 464. *Copeland v. Steem*, 8 T. R. 199. See *Spears v. Travers*, 4 Camp. 251. *Greave v. Hepke*, 2 B. & A. 131.

(s) *Hurry v. Mangles*, 1 Camp. 452. *Harman v. Anderson*, 2 Camp. 243.

(t) *Lucas v. Dorrein*, 7 Taunt. 278. *Hawes v. Watson*, 2 B. & C. 540. *Harman v. Anderson*, 2 Camp. 243. See *Stoveld v. Hughes*, 14 East. 308. *Stonard v. Dunkin*, 2 Camp. 344. *Cumming v. Brown*, 9 East. 506.

(u) See post. Book 4. cap. 1.

(w) See a learned note by Mr. Starkie, *Law of Evidence*, 2 ed. p. 892.

(x) *Slubey v. Heyward*, 2 H. Bl. 504.

(y) *Bunney v. Poyntz*, 4 B. & Ad. 570.

(z) *Fuller v. Abraham*, 3 B. & B. 116. See *Noble v. Adams*, 7 Taunt. 59. *E. of Bristol v. Welmore*, 1 B. & C. 514. *Gladstone v. Hadwen*, 1 M. & S. 517.

comply with any *warranty* he may have given. Such warranty may be either *implied* or *expressed*.

Where the dealing is in a particular branch of trade, the parties are presumed to contract according to its customs; and, therefore, if the custom be, to declare at the time of sale, whether the goods be sea-damaged; in the absence of such declaration, a warranty will be implied, that they are not so. (a) If the article were bespoke to answer a particular purpose, a warranty is implied that it will answer such purpose. (b) And in every contract to furnish manufactured goods, a warranty is implied that they shall be of a merchantable quality. (c) But the law will not imply a warranty, where the parties have expressly contracted, as to the nature and quality of the thing to be sold; thus, though we have just seen, that if A. contract with B. for manufactured goods, the law will imply a warranty that they shall be merchantable; yet no such warranty can be implied if A. purchase the goods by sample. (d) The notion, that a warranty might be implied from the extent of the prices given has long been exploded. (e)

Express Warranties.—Every affirmation, at the time of sale of personal chattels, is a warranty, provided it appear to have been so intended. (f) But a warranty after the sale is void

(a) *Jones v. Bowden*, 4 Taunt. 847.

(b) *Jones v. Bright*, 5 Bingham. 533.

Okell v. Small, 1 Stark. 108. See *Gray v. Cox*, 4 B. & C. 108.

(c) *Laing v. Fidgeon*, 6 Taunt. 108.

Holcombe v. Hewson, 2 Camp. 391.

Cooper v. Twibell, 3 Camp. 286. *Gardner v. Gray*, 4 Camp. 144.

Budge v. Wain, 1 Stark. 504.

(d) *Parkinson v. Lee*, 2 East. 314.

See *Budd v. Fairman*, 8 Bingham. 52.

(e) *Ibid.* *Baglehole v. Walters*, 3 Camp. 2. Where the terms of the con-

tract are ambiguous, the amount of the price may sometimes, perhaps, furnish a clue to their true meaning. *Allen v. Cameron*, 1 Cr. & Mee. 840.

(f) See 3 T. R. 59. per Buller, J. See *Helyar v. Hawke*, 5 Esp. 72. *Richardson v. Brown*, 1 Bingham. 344. *Dunlop v. Waugh*, Peake, 123. *Button v. Corder*, 7 Taunt. 405. *Liddard v. Kain*, 2 Bingham. 183. *Shepherd v. Kain*, 5 B. & A. 240. *Freeman v. Baker*, 2 Nev. & Mann. 446.

for want of consideration. (g) If the vendor affirm at the time of sale that the goods are his, that amounts to a warranty of his title; (h) but no oral allegation previously to a sale by written contract can possibly operate as a warranty, for the writing is the only evidence of the contract. (i)

Where the vendor has bound himself by a warranty, either express, or implied, the vendee may, as shall presently be explained more at length, use the breach of that warranty as evidence, in reduction of the vendor's claim for compensation, or may bring an action thereon against him. (k) But, he cannot, if he have received the article, return it, and recover the price as money paid on a consideration which has failed, unless there have been a condition in the contract authorizing such return, or the vendor have received back the chattel, and thereby consented to rescind the contract, or been guilty of a fraud, which destroys the contract altogether. The vendee cannot, by his own act alone, unless in the excepted cases above-mentioned, re-vest the property in the seller, and recover the price when paid, on the ground of total failure of consideration; and it follows, that he cannot, by the same means, protect himself from payment of the price, on the same ground. (m)

It is to be observed, that though the vendee of a specific chattel, delivered with a warranty, has no right to return it, the same reason does not apply to cases of executory contracts, where an article, for instance, is ordered from a manu-

(g) 3 Bl. Comm. 166. Finch, L. 779. Meyer v. Everth, 4 Camp. 22. 189. Kain v. Old, 2 B. & C. 634.

(h) Medina v. Stoughton, 1 Salk. 210. (k) Street v. Blay, 2 B. & Adol. 460. 3 T. R. 57, 58, per Buller, J. 2 Bl. Accord. Gompertz v. Denton, 1 Cr. & Meeson, 205, 3 Tyrwh. 232. See Weston v. Downes, 1 Dougl. 23. Towers v. Barrett, 1 T. R. 133. Payne v. Whale, 7 East. 274. Power v. Wells, Dougl. 24. n. Emanuel v. Dane, 3 Camp. 299.

(i) Pickering v. Dowsing, 4 Taunt.

(m) Street v. Blay, ubi supra.

facturer, who engages, that it shall be of a certain quality, or fit for a certain purpose, and the article sent, as such, is never completely accepted by the party ordering it. In this and similar cases, the latter may return it as soon as he discovers the defect, provided he has done nothing more in the meantime than was necessary to give it a fair trial; (*n*) nor would the purchaser of a commodity to be afterwards delivered according to sample, be precluded from returning the bulk, if not in accordance with the sample, within a reasonable time for examination and comparison. But in no case can a purchaser return a chattel where he has done more than is consistent with the purpose of trial, *ex. gr.* where he has resold it at a profit, and delayed his offer to return till it has come for the second time into his possession. (*o*)

It has been laid down by some writers of authority, that a future event cannot be warranted, as, that a horse shall be sound two years hence; (*p*) this doctrine is however overruled. (*q*) It is also laid down by the older books, that defects apparent at the time of a bargain are not included in a warranty, however general, because they can form no subject of deceit and fraud, and, originally, the mode of proceeding on a breach of warranty, was by an action of deceit grounded on a supposed fraud. A party, therefore, who should buy a horse, knowing it to be blind of both eyes, could not sue for that defect upon a general warranty of soundness: thus where the horse had a splint, which was known to both parties; in an action on a warranty of soundness, wind and limb, it was held, that the proper direction to the jury would be, to consider whether the horse was at the time of the bargain sound, wind and limb, *saving those manifest defects contemplated by*

(*n*) *Okell v. Smith*, 1 Stark. 107. See *Oxendale v. Wetherall*, 9 B. & C. 386.

(*o*) *Street v. Blay*, *ubi supra*. See *Shipton v. Casson*, 5 B. & C. 378.

(*p*) 3 Bl. Comm. 166.

(*q*) See *Liddard v. Kain*, 2 Bingh. 183. *Eden v. Parkinson*, Dougl. 705. and see a learned note by Mr. Serjeant Coleridge, to his edition of the Commentaries, vol. iii. 166.

the parties. (r) At a new trial of the same cause, it appeared, that some splints cause lameness, and others not; and the court then thought, that as the consequences of a splint cannot be apparent at the time of sale, like the loss of an eye, or any visible blemish or defect, the vendor must have meant to warrant that this was not such a splint as would occasion subsequent unsoundness; and the horse having gone lame in consequence of it, the vendee was held entitled to recover. (s)

We have seen that every affirmation at the time of sale of a personal chattel, is a warranty, *provided it appear to have been so intended*, and provided, the contract be not written and the affirmation merely oral. Where, however, the article is sold *by description merely*, and the allegations of the vendor, whether oral or contained in a written document, (t) do not amount to a warranty, but merely to representations, which afterwards turn out not to be consistent with fact, yet, if such representations were made according to his honest belief at the time, no action lies against him; but it is otherwise, if he knew that he was representing a falsehood, (u) in such case the vendee may maintain an action for the deceit, in which he must allege a *scienter*, and shew that the description was false within the knowledge of the seller. (w)

(r) *Margetson v. Wright*, 7 Bingh. 605. See 3 Bl. Comm. 166. *Bayley v. Merrel*, Cro. Jac. 387. *Dyer v. Hargrave*, 10 Vesey, 507.

(s) *Margetson v. Wright*, 8 Bingh. 457.

(t) As in *Budd v. Fairmaner*, 8 Bingh. 53. where a receipt was produced containing as follows:

“Received of Mr. Budd, £10 for a grey four year old colt warranted sound in every respect.”

Held that the warranty was confined

to soundness, and the age mere matter of description. See *Dickenson v. Gap*, cited *Budd v. Fairmaner*, 8 Bing. 50. *Freeman v. Baker*, 2 Nev. & Mann. 446.

(u) *Dunlop v. Waugh*, Peake, 223. *Jendwine v. Slade*, 3 Esp. 572. *Pickering v. Dawson*, 7 Taunt. 779. *Kain v. Old*, 2 B. & C. 634. *Dobell v. Stevens*, 3 B. & C. 625. *Fletcher v. Bowsher*, 2 Stark. 561.

(w) See Judgment of Tindal, C. J. in *Budd v. Fairmaner*, 8 Bingh. 53. and *Freeman v. Baker*, 2 Nev. & Mann. 446.

SECTION IV.—*Duties of Vendee.*

The duties incumbent on the vendee are, *first*, to accept the goods; and *secondly*, to pay for them.

If he refuse to accept them, the vendor, having performed all conditions precedent on his part, may sue him, either specially upon his contract, (x) or (if the property have passed to the vendee) for goods bargained and sold; in which latter form of action he will recover his entire price, while in the special form, he will recover but the amount of damage *actually* sustained by him. (y)

With respect to the conditions precedent, which the vendor, before suing, must have performed,—If the goods are to be delivered at a stipulated place, he must tender them there, unless, indeed, the vendee have refused, or put it out of his own power, to complete his contract. If there be no stipulated place, it is the vendee's business to fetch them. (z) Where the goods are to be forwarded by a carrier, the vendor must enter them, so that the carrier may be responsible for their value if lost. (a)

If the goods were not specific articles, but were to be of a particular description, they must be such as strictly correspond with that description, (b) *ex. gr.* with the sample, if they were sold by sample, (c) in which case the vendee has a right to inspect and compare before receiving them, and

(x) See *Boorman v. Nash*, 9 B. & C. 145. *Greaves v. Ashlin*, 3 Camp. 426. *Boyce v. Warburton*, 2 Camp. 480.

(y) *Hankey v. Smith*, Peake, 42. et notas. As to the measure of damages for not accepting stock, see *Hecksher v. Gregory*, 4 East. 607. *Bordenave v. Gregory*, 5 East. 107; for not replacing it, *Shepherd v. Johnson*, 2 East. 21. *M'Arthur v. Ld. Seaforth*, 2 Taunt. 257.

and see 7 G. 2. c. 8. s. 11. *Tate v. Wellings*, 3 T. R. 531.

(z) *Glazebronk v. Woodrow*, 8 T. R. 366. *Jones v. Berkeley*, Dougl. 687. See *Rawson v. Johnson*, 2 East. 203. *Callonel v. Briggs*, 3 Sal. 112.

(a) *Clark v. Hutchins*, 14 East. 475.

(b) *Tye v. Fynmore*, 3 Camp. 462. *Haydon v. Hayward*, 1 Camp. 180. *Ellis v. Hamlin*, 3 Taunt. 55.

(c) *Hibbert v. Shee*, 1 Camp. 113.

may, if prevented from doing so, rescind the contract. (d) It is said, that if a purchaser order *several* things *at the same time*, he may consider the contract as entire, and object to receive some of them without the rest; (e) but, that, if he accept one singly, he severs the contract, and cannot object to receiving another singly. (f) Where different lots are bought by the same person at the same auction, the purchase of each is a distinct contract. (g)

As fraud vitiates every contract, it will be a sufficient excuse for the vendee's non-performance of his, that the vendor was guilty of fraud, as, by employing puffers at an auction to enhance the price, without giving notice of his intention to do so; (h) though possibly there might be a difference, if the intent were not to enhance the price generally, only to prevent the goods from going off at an undervalue. (i) And it is clear that the employment of any one to bid, vitiates a sale advertised to be *without reserve*. (k) So, if the vendor fraudulently conceal what he ought to communicate, or give a false description of the goods, *ex gr.* by calling them the property of a gentleman deceased, and sold by order of his executor: (l) and, though

(d) *Lorymer v. Smith*, 1 B. & C. 1.

(e) *Champion v. Short*, 1 Camp. 53. *Neale v. Viney*, 1 Camp. 471. See *Chambers v. Griffith*, 1 Esp. 150; but *quære* if that case be law; and see *James v. Shire*, 1 Stark. 426. *Poole v. Shergold*, 2 Bro. C. C. 118. 1 Cox, 273. See on this subject *Symonds v. Carr*, 1 Camp. 361. *Hort v. Dixon*, Selw. N. P. 8th Ed. 109.

(f) *Gilb. Ev.* 191. 4. *Bragg v. Cole*, 6 Moore, 114. See *Walker v. Dixon*, 2 Stark. 281, but said to have been reversed in bank, in note to Stark. on Evidence, vol. 2, p. 872. *Boon v. Eyre*, 1 H. B. 254.

(g) *Roots v. Lord Dormer*, 4 B. &

Ad. 77. *Poole v. Shergold*, and *James v. Shire*, *ubi supra*.

(h) *Howard v. Castle*, 6 T. R. 642. *Bedwell v. Christie*, Cowp. 695. 3 Ves. J. 625. *Wheeler v. Collier*, 1 M. & M. 123. *Crowder v. Austen*, 3 Bingh. 368.

(i) *Smith v. Clarke*, 12 Ves. 477.

(k) *Meadows v. Tanner*, 5 Madd. 34.

(l) *Bexwell v. Christie*, Cowp. 395. *Early v. Garrett*, 9 B. & C. 928. *Hill v. Gray*, 1 Stark. 434. *D. of Norfolk v. Worthy*, 1 Camp. 340. *Schneider v. Heath*, 3 Camp. 506. *Baglehole v. Walters*, 3 Camp. 154. *Pickering v. Dowson*, 4 Taunt. 779. *Jones v. Bowden*, *ibid.* 847.

an article be sold *with all faults*, yet, artifice used by the vendor to disguise, vitiates the sale; (m) but it is not so clear whether his knowledge of the faults, will, if he use no artifice, have that effect. (n) It seems that if the vendee knew a misdescription to be such, he cannot avoid the sale on account of it. (o) It has been said, that the vendor cannot maintain an action, on his contract to sell and deliver at a future day, goods, which, at the time of so contracting, he had not in his possession, had not contracted to buy, and had no expectation of receiving by consignment; such a transaction amounting to a wager on the price. (p)

If the goods have been delivered, and the vendee, after that, neglect to pay the price, the vendor may recover it in an action for goods sold and delivered; nay, there are instances, in which he has been allowed to waive the tort and recover in this form of action, against one who had wrongfully and fraudulently gained possession of them. (q) But he cannot recover in assumpsit, before the time of credit, if there be one, has expired; although the fraud of the defendant, be such, as would entitle him to rescind the contract, and bring trover for the goods immediately. (r)

(m) *Baglehole v. Walters*, 3 Camp. 154.

(n) *Ibid.* *Mellish v. Motteux*, Peake, 85.

(o) *Dyer v. Hargrave*, 10 Ves. J. 505.

(p) *Bryan v. Lewis*, 1 R. & M. 386. See *Macgregor v. Lowe*, 1 R. & M. 57. The Court will, if possible, construe a contract so as to hinder it from bearing the construction of a wager, *ex. gr.* where the bought and sold note was "Sold for J. S. to A. B., about 32 tons, more or less, of Riga Rhine Hemp, on arrival per Fanny and Almira, at £82..10s. per ton." This was construed to mean that the hemp should be sold *if it arrived*, not to import an

engagement that it should arrive. *Boyd v. Siffkin*, 2 Camp. 326. *Hawes v. Humble*, cited *ib.* *Hayward v. Scougall*, 2 Camp. 56. But where the contract was for hemp "to be shipped on or before the 31st August, Old Style," this was held to import an undertaking that the hemp should be shipped. *Splidt v. Heath*, 2 Camp. 57. n.

(q) *Hill v. Perrott*, 3 Taunt. 274. *Biddle v. Levy*, 1 Stark. 20, per Gibbs, C. J. See *vide* B. N. P. 130. *Lee v. Shore*, 1 B. & C. 94.

(r) *Ferguson v. Carrington*, 9 B. & C. 59. See *De Symmonds v. Minchwick*, 1 Esp. 430. *Read v. Hutchinson*, 3 Camp. 352.

It sometimes happens, that there is such a difference between the goods delivered and their description in the bargain, as would have justified the vendee in refusing to receive them; notwithstanding which he has taken them into his possession, and made use of them. In such a case, it seems, that his conduct would be taken to amount to a confession that the vendor had performed his contract, and that he would be obliged to pay the whole price stipulated. (*s*) But there are some cases, in which, it would be impossible, or very difficult, to return the goods; for instance, where they consist of bricks and timbers, put together in the shape of a building; or the breach of contract may not have been discovered till the articles have been received and used by the vendee. In such a case, it was formerly thought that the vendor ought to recover the whole price, and the vendee to bring a cross action for the breach of contract. (*t*) It now, however, is agreed, that the vendee may, in the action by the vendor, give evidence of the breach of contract, and that the vendor shall not recover more than the value of the benefit which the vendee has actually derived; and therefore, where there has been no benefit derived, shall recover nothing at all. (*u*) And this rule holds, even when the vendee's complaint is, that the vendor has not complied with an express warranty, (*w*) as for instance, that a horse is sound; in which case, it is clear, that no acceptance of the goods can amount to a conclusive recognition that the vendor has performed his contract, (though a presumption to that effect may arise from long

(*s*) *Grimaldi v. White*, 4 Esp. 95. *Fisher v. Samuda*, 1 Camp. 190. *Groning v. Mendham*, 1 Stark. 257. *Hunt v. Silk*, 5 East. 449. Sed vide *Allen v. Cameron*, 1 Cr. & Mee. 837.

(*t*) *Broom v. Davis*, 7 East. 480, in notâ.

(*u*) See *Farnsworth v. Gerrard*, 1

Camp. 38. *Basten v. Butter*, 7 East. 484. *Okell v. Smith*, 1 Stark. 107. *Allen v. Cameron*, 1 Cr. & Mee. 837.

(*w*) *Street v. Blay*, 2 B. & Ad. 456. *Cormack v. Gilles*, 7 East. 480. *King v. Boston*, 7 East. 481, n. *Poulton v. Lattimore*, 9 B. & C. 259.

silence on the part of the vendee,) (x) and that a cross action, may, if the vendee please, be brought upon the warranty. (y)

Where goods are sold without an express stipulation as to price, (z) the vendor has a right to receive as much as they are, on a reasonable estimation, worth ; and, in the absence of proof as to their value, it is presumed that they were of the lowest price of goods of that description ; unless the vendee have himself suppressed the means of ascertaining the truth, for then a contrary presumption arises. (a)

For information respecting the *mode* of payment, the reader is referred to the next chapter.

SECTION V.—*Illegality of Contract an Excuse for Non-performance by either Party.*

Either party may, of course, excuse himself from the performance of his contract, by shewing that it is illegal ; as, where the goods were drugs, sold to a brewer to be used in his

(x) *Fielder v. Starkin*, 1 H. B. 17. See *Hopkins v. Appleby*, 1 Stark. 477. *Prosser v. Hooker*, 1 Moore, 106.

(y) *Buchanan v. Parnshaw*, 2 T. R. 745. *Street v. Blay*, 2 B. & Ad. 456.

(z) It has been already stated, that the prevalent opinion is, that where the vendor relies on a note in writing to satisfy the statute of frauds, and that note contains no stipulation as to price, performance of the contract, if still executory, cannot be enforced. "Whether, in all cases of an executory contract of purchase and sale, where the parties are silent as to the price, the law will supply the want of any agreement as to price, by inferring that the parties must have intended to buy and sell at a reasonable price, may be a question of some difficulty. Undoubtedly the law makes that inference where the contract is

executed by the acceptance of the goods by the defendant, in order to prevent the injustice of the defendant taking the goods without paying for them. (2 Wms. Saund. 121. *Webber v. Tivill*, n. 2.) But it may be questionable, whether the same reason applies to a case where the contract is *executory* only, and where the goods are still in the possession or under the controul of the seller : "per *Tindal, C. J.* in *Acebal v. Levy*, 10 Bingh. 382. At all events, where there has been a sale *by parol*, at a fixed price, the plaintiff cannot, by producing a written agreement, silent as to price, recover on a quantum valebat. *Elmore v. Kingscote*, 5 B. & C. 583. *Acebal v. Levy*.

(a) *Clunns v. Perry*, 1 Camp. 8. et notas. *Armory v. Delamirie*, 1 Str. 505.

brewery, (b) or bricks under the statutable size, (c) or libellous and obscene prints, (d) or dress, furnished for the express purpose of prostitution; (e) nor is it an excuse that the parties *thought* they were acting legally. (f) A distinction has lately been drawn, between cases in which the contract violates a law designed for the protection of the public, and those in which it violates a law merely designed for the protection of the revenue; and it has been said, that, in the former cases only is the contract void. (g) But, *quære*, whether there be any solid ground for this distinction. (h) In *Wetherall v. Jones*, 3 B. & Adol. 223. Lord Tenterden says, "where a contract, which a party seeks to enforce, is, expressly, or by implication, (i) forbidden, by the statute, or common, law, no Court will lend its assistance to give it effect; and there are numerous cases in the books, in which, an action on the contract has failed, because, either the consideration for the promise, or the act to be done, was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy. But *where the consideration and the matter to be performed are both legal*, we are not aware, that a plaintiff has ever been prevented from recovering, by *an infringement of the law not contemplated by the contract*, in the performance of something to be done on his part;" and there-

(b) *Langton v. Hughes*, 1 M. & S. 523.

(c) *Law v. Hodgson*, 11 East. 300.

(d) *Fores v. Johnes*, 4 Esp. 97.

(e) *Bowry v. Bennett*, 1 Camp. 348.

(f) *Wilkinson v. Londonsack*, 3 M. & S. 126.

(g) *Brown v. Duncan*, 10 B. & C. 93. See *Hodgson v. Temple*, 5 Taunt. 181. *Johnson v. Hudson*, 11 East. 180.

(h) See most of the cases collected in Selw. N. P. 8th Ed. 65. Starkie on Evidence, 2d Ed. p. 885. See in addi-

tion to the cases there cited *De Begnis v. Armistead*, 10 Bingham. 107. *Stephen v. Robinson*, 2 Tyrwh. 280. *Little v. Poole*, 9 B. & C. 192, and *R. v. Kilderby*, 1 Wms. Saund. 309 a. in notis. Exp. Daniel, 14 Ves. 192. *Duvergier v. Fellowes*, 10 B. & C. 248.

(i) *Ex gr.* where a statute without saying that a contract shall be void, inflicts a penalty on the maker; for a penalty implies a prohibition. See judgment of Tindal, C. J. in *De Begnis v. Armistead*, 10 Bingham. 107

fore, in that case, a rectifier having, contrary to stat. 6 G. 4. c. 8. ss. 115. 117. sold spirits, without a permit expressing their true strength, was allowed to maintain an action for the price.

By stat. 29 Car. 2. c. 7. (k) no tradesman, workman, labourer, or other person whatever, shall do or execute any worldly labour, work, or business *of their ordinary calling*, except works of necessity and charity, or publicly cry, shew forth, or expose to sale any wares, merchandizes, fruit, herbs, goods or chattels upon the Lord's day. It has been held since this act, that the sale of a horse on Sunday, not being within the plaintiff's *ordinary calling*; is not void, (l) *contra* where it is so; (m) the statute prohibiting work done in a man's *ordinary calling*. (n) It has been said too, that a contract of sale is not void against a person ignorant that the vendor was exercising his *ordinary calling*, (o) but this is questionable. (p) And where a heifer was sold on Sunday, and the vendee retained, and on a *subsequent day*, promised to pay for it, he was held liable upon his subsequent promise. (q) There is an exception in the act, in favour of sales of meat, in inns, cook-shops, and victualling houses, for such as cannot otherwise be provided, and of crying or selling milk, before nine in the morning, and after four in the afternoon. (r) Mackarel also may be sold on Sundays, before and after divine service. (s)

By stat. 70 G. 2. c. 8. entitled *an act to prevent the infamous*

(k) See 27 Hen. 6. c. 5. 3 Car. 1. c. 1.

(l) Drury v. Defontaine, 1 Taunt. 131.

(m) Ibid. Fennell v. Ridler, 5 B. & C. 406.

(n) R. v. Whitnash, 7 B. & C. 596.

(o) Bloxom v. Williams, 3 B. & C. 232.

(p) Vide Smith v. Sparrow, 4 Bingh. 84.

(q) Williams v. Paul, 6 Bingh. 653.

(r) See further on this act, Chitty's collection of statutes, 29 Car. 2. c. 7. in notis; and see also as to the qualifications under which a baker's business may be conducted on Sunday, 34 G. 3. c. 61. 50 G. 3. c. 73. s. 3. 53 G. 3. c. 99. s. 12. 1 & 2 G. 4. c. 50. s. 11. 3 G. 4. c. cvi. s. 16.

(s) St. 10 & 11 W. 3. c. 24.

practice of stock jobbing, and made perpetual by 10 G. 2. c. 8. all contracts, upon which any premium shall be given, for liberty to put upon, deliver, receive, accept, or refuse, any public or joint stock, or other public securities whatsoever, and all wagers, and contracts in the nature of wagers, and all contracts in the nature of putts and refusals, relating to the present or future value thereof, shall be null and void to all intents and purposes; and all premiums or sums of money paid on such contracts or wagers may be sued for within six months after the making the contract or wager, and recovered with double costs of suit. (t)

And all contracts, for the buying, selling, assigning, or transferring any such stock or securities, which the person contracting is not at the time of the contract possessed of or entitled to, are void to all intents and purposes. (u)

But nothing in this act extends to prevent any person from lending money on such stock or securities, or to hinder any contract from being made, for the redelivering, assigning, or transferring the same, upon repayment of the sum lent with interest. (w)

This act, breaches of the provisions of which are punishable by heavy penalties, is considered remedial rather than penal; (x) it appears to be applicable only to gambling in the British funds. (y) Time bargains in the foreign funds may, however, be invalid within the principle laid down in *Bryan v. Lewis*, 1 R. & M. 386. and above stated. *Omnium*, is within the act. (z) The provisions do not apply to cases where the person agreeing to transfer is actually possessed of the stock, and therefore, not to a loan of stock, with an un-

(t) Sect. 1.

(u) Sect. 8.

(w) Sect. 11.

(x) *Billing v. Flight*, 6 Taunt. 419.
2 Marsh. 124.

(y) *Henderson v. Bise*, 3 Stark. 158.

Sed vide *Rossum v. Taylor*, Chitty's Statutes, 1st ed. 1032. n. b.

(z) *Brown v Turner*, 2 Esp. 632.
7 T. R. 630.

dertaking to replace it ; (a) and a person who has *omnium* potentially in possession may contract to sell it. (b)

A sale may be illegal for contravening those enactments of the legislature, which aim at the establishment of uniformity of weights and measures. (c) By stat. 5 G. 4. c. 74, the operation of which, was by 6 G. 4. c. 12. postponed to January 1, 1826, an imperial standard yard, pound, gallon, and bushel for heaped measure, are fixed, and the principle laid down, on which they may be renewed, if lost or destroyed. Models and copies of these and their parts and multiples, are to be deposited at the chamberlain's office, Westminster, and sent to London, Edinburgh, Dublin, and other cities and places. The magistrates are to procure them for the use of their respective counties, and all contracts are to be governed by these standards, unless express agreement be made to the contrary ; and if it be, unless the proportion of the local or special measure to the standard be specified in the agreement, such agreement shall be null and void. (d) Several statutes have at different times been passed for the prevention of false and defective weights, balances, and measures, by the intervention of justices of the peace. (e)

(a) *Saunders v. Kentish*, 8 T. R. 165.
Child v. Morley, 8 T. R. 610. *Lightfoot v. Creed*, 2 B. Moore, 265. See *Mad-dock v. Rumball*, 8 East. 304.

(b) *Oliverson v. Coles*, 1 Stark. 496.

(c) See *R. v. Major*, 4 T. R. 750.
Tyson v. Thomas, 1 M'Clell. & Y. 119.
Hospital of St. Cross v. Howard de Walden, 6 T. R. 338. *Noble v. Durrell*, 3 T. R. 271. *Watts v. Friend*, 10 B. &

C. 448.

(d) See *Watts v. Friend*, 10 B. & C. 448. in which it was contended that a sale, by the Winchester measure, formerly the standard of the kingdom, *R. v. Major*, 4 T. R. 750. was still legal, the court appeared to think otherwise, but the point was not decided.

(e) 35 G. 3. c. 102. 37 G. 3. c. 143. 55 G. 3. c. 43.

CHAPTER XII.

CONTRACTS OF DEBT.

SECTION 1. *Definition of Contract.*2. *Duty of Debtor.*3. *Duty of Creditor.*SECTION I.—*Definition of Contract.*

A CONTRACT of debt is defined by Sir W. Blackstone, to be that, whereby a chose in action, or right to a certain sum of money, is mutually acquired and lost; and he remarks, that it may arise from any of the other contracts; as, in case of sale, if the price be not paid in ready money, the vendee becomes indebted for its amount to the vendor, and the vendee has the property in this price, as a chose in action, by means of this contract of debt. Any contract, in short, whereby a determinate sum of money becomes due to any person, and is not paid, but remains in action merely, is a contract *of debt*, (a) and, as the consideration of this contract, therefore, will illustrate all those of which I have previously treated, it has been reserved for the last chapter.

SECTION II.—*Duty of Debtor.*

The parties to this contract are called *debtor* and *creditor*: the debtor's duty under it, is, to tender payment at the proper time, *i. e.* generally speaking, before an action brought against

(a) Bl. Comm. 465.

him, (b) in the proper mode, and to the proper amount: the creditor's, to receive it, and make him a proper acquittance: we will consider these in order.

Mode of Payment.—Where the creditor has himself chalked out the mode of payment, it will be sufficient to follow his directions; thus, where he desires that a bill or note may be remitted by the post, if it be lost, the loss will fall on him. (c) But delivery to a bellman, in the street, would not be a sufficient putting into the post. (d) In the absence of directions from the creditor, there must, to constitute a legal tender of the debt, be an actual production and offer of the sum due, unless the creditor dispense with it by a declaration that he will not accept it; (e) and this tender must be of *money*, if beyond 40s., in gold, (f) or in what has been rendered, by act of Parliament, equivalent to money, for that purpose, viz. notes of the Bank of England, payable to bearer on demand, which are a legal tender for any sum above *five pounds*, except at the Bank itself, and its branches. (g) But although, strictly speaking, a legal tender must be in money, if required, yet a tender of country bank notes, if not objected to on that account, will be sufficient. (h) The tender of a larger sum than the sum due, is legal; (i) but a tender of a larger sum, requiring change, is not so; (k) nor is a tender good if ac-

(b) *Briggs v. Calverly*, 8 T. R. 629.

(c) *Warwick v. Nokes*, Peakes 67.

(d) *Hawkins v. Rutt*, Peake, 187.

This case, however, is said to be controverted by a late decision, of which I have been unable to procure a note: possibly the bellman in *Hawkins v. Rutt* was not employed by Government.

(e) *Thomas v. Evans*, 10 East. 101.

Dickinson v. Shee, 4 Esp. 78. *Glascot v. Day*, 5 Esp. 48. *Holland v. Phillips* 6 Esp. 46.

(f) 56 G. 3. c. 68.

(g) Stat. 3 & 4 W. 4. c. 6. s. 98.

this act takes effect from 1st August, 1834.

(h) *Polglase v. Oliver*, 2 Tyrwh. 92. when the other cases on that subject are all cited.

(i) *Dean v. James*, 4 B. & Ad. 546. *Wade's case*, 5 Rep. 114. Noy. 74.

(k) *Robinson v. Cook*, 6 Taunt. 336. *Watkins v. Robb*, 2 Esp. 711. *Betterbee v. Davis*, 3 Camp. 70.

accompanied by a condition, (*l*) as that a document shall be given up to be cancelled, or a receipt *in full* given, or it seems, with a protestation against the creditor's right to receive. (*m*)

However, if the creditor refuse to receive the money, on some other account, *ex. gr.* on the ground that more is due to him, and do not object to the informality of the tender, that will, in general, cure such informality; (*n*) but though an *informal* offer of the money may be thus available, yet there must be an offer. (*o*) A tender to an authorized agent is a tender to his principal; (*p*) and a tender to one of several joint creditors, is a tender to all. (*q*)

Although, as we have seen, there can be no *legal tender*, except of cash or its equivalent, yet payment is often, by mutual consent, made in a bill or note, the taking of which, amounts to an agreement to give the debtor credit for the time it has to run, and suspend the creditor's remedy in the meanwhile, (*r*) (except in cases where the debt is also secured by a specialty.) (*s*) It is, however, in general, no satisfaction of any debt or demand, for which it has been given: (*t*) but

(*l*) *Mitchell v. King*, 6 Car. & P. 237.
Evans v. Judkin, 4 Camp. 756. *Free v. Kingston*, *ibid.* *Huxham v. Smith*, 2 Camp. 21. *Glascott v. Day*, 5 Esp. 48.
Sed vide Cole v. Blake, Peake, 179.

(*m*) *Simmons v. Wilmot*, 3 Esp. 91.

(*n*) See *Wright v. Read*, 3 T. R. 554.
 2 B. & . 526. *Lockyer v. Jones, Peake*, 180. *Black v. Smith, Peake*, 88. *Cole v. Blake, Peake*, 179. but see *Huxham v. Smith. Glascott v. Day, supra. Read v. Golding*, 2 M. & S. 86.

(*o*) *Thomas v. Evans*, 10 East. 101.
Dickinson v. Shee, 4 Esp. 68. See *Douglas v. Patrick*, 3 T. R. 684.

(*p*) *Goodland v. Blewith*, 1 Camp. 477.

(*q*) *Douglas v. Patrick*, 3 T. R. 683.

(*r*) *Stedman v. Gooch*, 1 Esp. 3.
Kearslake v. Morgan, 5 T. R. 513.
Dangerfield v. Wilby, 4 Esp. 159.

(*s*) *Drake v. Mitchell*, 3 East. 251.
Curtis v. Rush, 2 V. & B. 419. B.N.P. 182.

(*t*) *Packford v. Maxwell*, 6 T. R. 52.
Owenson v. Morse, 7 T. R. 64. *Tapley v. Martens*, 8 T. R. 451. *Goodman v. Coates*, 1 M. & Rob. 12. where *Parke, J.* held at N.P. that a vendor taking from vendee the note of a third party, payable two months after date, and not indorsed by the vendee, was not bound to present it before suing for the price, for that it was the duty of the maker, to pay it without demand, and therefore that of the vendee to see it paid.

only *prima facie* evidence of payment, rendering it necessary that the creditor should account for it, before he can be entitled to recover the consideration. Yet, although, generally speaking, it is no satisfaction, it will operate as such, if the debtor's liability upon it be discharged by its loss, or by the holder's laches or folly, as if he alter it so as to discharge the parties thereto; (*u*) or if the creditor agree to receive it *as cash*, and take upon himself the risk of its being paid, (*w*) or if he negotiate it, (*x*) or if it were transferred to him by way of sale, (*y*) unless the party giving it, knew at the time that it was of no value, for that is fraud (*z*) upon discovery of which, the holder may, if the instrument were given in payment for goods, disaffirm the contract of sale, and sue for them in trover. (*a*)

If payment is to be made by a bill payable at a certain period, the creditor cannot, even if the bill be not delivered according to agreement, commence an action on the consideration, till the expiration of that period, though he may sue in the meantime upon the special contract, and complain of the nondelivery of the bill in conformity thereto; (*b*) and where goods were sold at six months' credit, payment then to

(*u*) Bayley on Bills, 5th ed. 365. Alderson *v.* Langdale, 3 B. & Adol. 660. Bridges *v.* Berry, 3 Taunt. 130. Bishop *v.* Rowe, 3 M. & S. 362.

(*w*) Read *v.* Hutchinson, 3 Camp. 352. See Owenson *v.* Morse, *supra*. Camidge *v.* Allenby, 6 B. & C. 383. Ward *v.* Evans, 2 Ld. Raym. 930. Brown *v.* Kewley, 2 B. & P. 518. Clerk *v.* Mundell, 12 Mod. 303. 1 Sal. 124. Anon. 12 Mod. 408. Anon. *ibid.* 570.

(*x*) Bunney *v.* Poyntz, 4 B. & Ad. 570.

(*y*) Fydell *v.* Clarke, 1 Esp. 477. Exp. Shuttleworth, 3 Ves. 368. Bank

of England *v.* Newman, B. N. P. 277. Exp. Isbester, 1 Rose, 23.

(*z*) See Fenn *v.* Harrison, 3 T. R. 759.

(*a*) Hawe *v.* Ramsbottom, 1 R. & M. 414. Bishop *v.* Shillito, 2 B. & A. 329. Read *v.* Hutchinson, 3 Camp. 352. E. of Bristol *v.* Wilsmore, 1 B. & C. 514. Kilby *v.* Wilson, 1 R. & M. 178.

(*b*) Helps *v.* Winterbottom, 2 B. & Ad. 431. See Dutton *v.* Solomonsen, 3 B. & P. 582. Mussen *v.* Price, 4 East. 147. Brook *v.* White, 1 N. R. 330. Price *v.* Nixon, 5 Taunt. 338. Day *v.* Picton, 10 B. & C. 121.

be made by a bill at two or three months, this was considered in effect, a nine months' credit. (c)

2dly. *Amount of Payment—Interest.*—The amount of the sum due to the creditor, is frequently, between the time of contract and that of payment, increased by the addition of *Interest*.

Interest is, and always was, payable where there has been a contract to that effect, express, or to be implied, from circumstances, the usage of trade, or the mode of dealing between the parties; (d) and also upon a bond, bill, or promissory note. (e)

In most other cases, there was a considerable dispute upon the question of interest, and the leaning of the courts seemed on the whole against allowing it. (f) However, by stat. 3 & 4 W. 4. cap. 42. it is enacted, that upon all debts or sums certain, payable at a certain time, or otherwise, the jury, on the trial of any issue or inquisition of damages, may, if they think fit, allow interest for the creditor, at a rate not exceeding the current rate of interest, from the time when such

(c) *Helps v. Winterbottom*, ubi. supra. Parke, J., dubitant.

(d) *Eddowes v. Hopkins*, Dougl. 376. *Marshall v. Poole*, 13 East. 98. *Porter v. Palsgrave*, 2 Camp. 472. *Becher v. Jones*, 2 Camp. 428. *Boyce v. Warburton*, 2 Camp. 480. *Robinson v. Bland*, 2 Burr. 1077. *Arnott v. Redfern*, 3 Bing. 353. *Nicholl v. Thomson*, 1 Camp. 52. *Bruce v. Hunter*, 1 Camp. 467. *Moore v. Voughton*, 1 Stark. 487.

(e) *Vernon v. Cholmondeley*, Bunb. 119. *Doman v. Dibdin*, 1 R. & M. 381. *Francis v. Wilson*, 1 R. & M. 105. *Farquhar v. Morris*, 7 T. R. 124. Sed vide *Hogan v. Page*, 1 B. & P. 337.

See *Parker v. Hutchinson*, 3 Ves. 183. *Upton v. L. Ferrers*, 5 Vesey, 803.

(f) See *Gordon v. Swan*, 12 East. 419. *Higgins v. Sargent*, 2 B. & C. 348. *Arnott v. Redfern*, 3 Bingh. 353. *De Havilland v. Bowerbank*, 1 Camp. 50. *Calton v. Bragg*, 15 East, 223. *Trelawney v. Thomas*, 1 H. B. 303. *De Bernales v. Fuller*, 2 Camp. 427. *Nichol v. Thompson*, 1 Camp. 52. *De Bernales v. Wood*, 3 Camp. 258. *Blackmore v. Fleming*, 7 T. R. 446. *Hilhouse v. Davis*, 1 M. & S. 169. *Page v. Newman*, 9 B. & C. 378. *Foster v. Weston*, 7 Bingh. 711. *Edwards v. Vere*, 2 Nev. & Mann. 123.

debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law. (g) And that the jury, on the trial of any issue or inquisition, may, if they think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of insurance. (h) And where a writ of error has been sued out in any action personal, and judgment given for the defendant thereon, interest shall be allowed by the Court of Error, for such time as execution has been delayed by such writ of error. (i)

With respect to compound interest, *i. e.* interest on a balance of account debiting the debtor with former interest, it is allowable where there is a contract to that effect, either express or to be collected from circumstances, as where the parties had been in the habit of dealing on those terms, (k) or a banker's customer knew it to be the practice of the house, (l) but not otherwise. (m)

Usury.—Immediately connected with the subject of interest is that of usury, the law concerning which, is at present regulated by stat. 12 Ann. stat. 2. c. 16. which enacts that no person shall take either directly or indirectly, for loan of any monies, wares, merchandizes, or commodities,

(g) Sect. 28.

(h) Sect. 29.

(i) Ibid.

(k) Bruce v. Hunter, 3 Camp. 467.

Newal v. Jones, 1 M. & M. 449. See 4 Madd. 64 n.

(l) Moore v. Voughton, 1 Star. 487.

(m) Dawes v. Pinner, 2 Camp. 486 n.

above the value of 5*l.* for the forbearance of 100*l.* for a year, and so after that rate, &c. and that all bonds, contracts, and assurances, for the payment of more, shall be void; and that any person receiving more shall forfeit the treble value of the loan.

Usury is constituted, either by a direct loan and receipt of interest at more than 5 per cent., or some device for the purpose of concealing such a loan, which really existed. (*n*) A loan of stock is usurious, if it is to be repaid, at the option of the lender, by replacing the stock, or by the produce with 5 per cent. interest. (*o*) So if the discounter of a bill stipulates for a premium to be paid to the agent employed by the holder to discount it, such premium making, with the discount, more than 5 per cent. (*p*) So, too, a sum taken under the name of commission, may, in reality, be a mere cloak for usury. (*q*) A fresh contract, made in continuation of a former usurious one, is void, (*r*) unless, indeed, it leave out the part which made the former one usurious, (*s*) or be made with a party not privy to the former usury. (*t*) But if an usurious contract be made in continuation of a legal one, the former contract remains good, though the latter is void. (*u*) We have already considered the effect of usury on promissory notes and bills of exchange, and the exception of certain bills and notes, from the usury laws, by stat. 3 & 4. W. 4. cap. 98. (*w*)

(*n*) *Barclay v. Walmesley*, 4 East, 57. See *Parker v. Ramsbottom*, 3 B. & C. 257. *Meago v. Simmons*, 1 M. & M. 121. *Gilpin v. Enderby*, 5 B. & A. 954.

(*o*) *White v. Wright*, 3 B. & C. 272. *Chippendale v. Thurston*, 1 M. & M. 411. See *Parker v. Ramsbottom*, 3 B. & C. 257. and see 17 Ves. 44. *Mad-dock, v. Rumball*, 8 East. 304, where the transaction was upheld.

(*p*) *Meago v. Simmons*, 1 M. & M.

121. See *Solarte v. Melvil*, 7 B. & C. 430.

(*q*) *Carstairs v. Stein*, 4 M. & S. 192. See *Doe v. Gooch*, 3 B. & A. 664.

(*r*) *Preston v. Jackson*, 2 Star. 237.

(*s*) *Barnes v. Hedley*, 2 Taunt. 184. *Wright v. Wheeler*, 1 Camp. 165.

(*t*) *Cuthbert v. Haley*, 8 T. R. 390. *Pickering v. Banks*, Forrest. 72.

(*u*) *Parker v. Ramsbottom*, 3 B. & C. 357. See *Gray v. Fowler*, 1 H. Bl. 462.

(*w*) See ante, 158.

Appropriation of Payments.—There is another subject connected with payment, which this seems the proper place for considering, viz. the *Appropriation* of the debtor's payments.

It frequently happens that a party who pays money is indebted in several ways to the party who receives it from him; in such cases it becomes a question, to the reduction of which of his debts the payment must be applied. The rule is, that the party paying has power to make the application *at the time of payment*, (*x*) which he may do either by express words, or a conduct indicative of his intention; (*y*) but that if he neglect to make it, the party receiving may, (*z*) and is not bound to make an immediate application; (*a*) though, perhaps, he ought to make one within a reasonable time. (*b*)

When there is *an account current* between the parties, *ex. gr.* a banking account, the law, in the absence of any other specific arrangement between them, presumes that they intended to apply the first item on the credit side to the first item on the debit side, and so on. (*c*) Where there are distinct demands, one against a firm, and the other against one only of the partners, if the money paid be the money of the partners, and be not specifically appropriated by the payer, the creditor must not, and the law will not, apply it to the demand upon the individual, for that would be to pay the debt of one with

(*x*) Per Bayley, *J. Mayfield v. Wadswell*, 3 B. & C. 363.

(*y*) *Clayton's case*, 1 Meriv. 572. *Newmarch v. Clay*, 14 East. 239. *Shaw v. Picton*, 4 B. & C. 715. *Taylor v. Kymer*, 3 B. & Ad. 334. *Marryatt v. White*, 2 Stark. 101.

(*z*) *Goddard v. Cox*, 2 Str. 1194. *Plomer v. Long*, 1 Stark. 153. *Marryatt v. White*, 2 Stark. 101. *Mathews v. Walwyn*, 4 Ves. 118. *Peters v. Anderson*, 5 Taunt. 596. *Hall v. Wood*, 14 East. 243 n. *Kirby v. Duke of Marl-*

borough, 2 M. & S. 18. *Bosanquet v. Wray*, 6 Taunt. 597. *Bodenham v. Purchas*, 2 B. & A. 39.

(*a*) *Simson v. Ingham*, 2 B. & C. 65. See *Cox v. Troy*, 5 B. & A. 474.

(*b*) Vide *Simson v. Ingham*, per Best, J.

(*c*) *Clayton's case*, 1 Meriv. 572. *Bodenham v. Purchas*, 2 B. & A. 45. See *Dawe v. Holdsworth*, Peake, 64. et notas. *Wilson v. Hirst*, 4 B. & Adol. 767.

the money of others. (*d*) And though where prior demands are equitable, and subsequent ones legal the creditor may apply a general payment to the former; (*e*) yet, if the prior ones be legal, and the subsequent equitable, the courts will not allow a general payment to be appropriated at the time of trial to the latter. (*f*) Nor will an appropriation be allowed, which would deprive the party paying of a benefit, such as the taxation of costs, and therefore an attorney cannot apply a general payment to the taxable items of his bill only. (*g*) If some of the demands be illegal, a general payment will be applied to the legal demands. (*h*) Where the same broker sold goods of A. and goods of B. to the payer, a general payment, if insufficient to discharge both debts, must be applied proportionably to them both. (*i*) An intention on the part of the debtor to appropriate to a particular debt, is perhaps more easily presumed, in favour of a surety, where there are any circumstances which can be considered indicative thereof; (*k*) but in the absence of such circumstances, *the law*, it seems, will *not* apply a payment in his favour. (*l*)

SECTION III.—*Duty of Creditor.*

The duty of the creditor is, to receive the payment, if tendered at the proper time, and give a proper acquittance. The consequence of his refusing payment when tendered, will be, that, if he afterwards commence an action for the amount, the tender, accompanied by a payment of the sum tendered into court, will be a good defence, unless the creditor can prove a

(*d*) *Thompson v. Brown*, 1 M. & M. 40.

(*e*) *Bosanquet v. Wray*, 6 Taunt. 597. 2 Marsh. 519. Sed vide *Birch v. Tebbutt*, 2 Stark. 74.

(*f*) *Goddard v. Hodges*, 2 Tyrwh. 213.

(*g*) *James v. Child*, 2 Tyrwh. 735.

(*h*) *Ribbans v. Crickett*, 1 B. & P. 264. *Wright v. Laing*, 1 B. & C. 166. Sed vide *Cruickshanks v. Rose*, 1 M. & Rob. 100.

(*i*) *Favenc v. Bennett*, 11 East. 36.

(*k*) *Maryatts v. White*, 2 Stark. 101.

(*l*) *Plomer v. Long*, 1 Star. 153. See *Kirby v. D. of Marlboro'*, 2 M. & S. 18.

prior or subsequent demand and refusal. (*m*) Such a tender, moreover, will prevent interest from afterwards running against the debtor. (*n*)

As to Acquittance.—It seems doubtful whether the debtor had, at common law, a right to demand a receipt on payment, excepting from the King's receiver. (*o*) However, by stat. 43 G. 3. cap. 126. s. 5. he is empowered to tender a blank receipt, at the time of payment, which the creditor is bound to fill up, and pay the amount of the stamp, under a penalty of ten pounds.

A receipt, though strong, is not *conclusive* evidence of payment, (*p*) unless it be by deed, for then the law admits no evidence to the contrary. (*q*) A receipt in full of all demands, is an admission of great weight, and it has even been said, that in the absence of mistake, it is conclusive; (*r*) but this doctrine seems incapable of being supported, and we may venture to assume that it must, like other matters, not amounting to estoppel, be used as evidence, to be submitted to the jury, and capable of being rebutted. (*s*) A receipt for less than 5*l.* does not require a stamp; (*t*) other receipts do, and cannot be stamped after they have been written, (*u*) except within fourteen days, on payment of the duty and 5*l.*; or one calendar month, on payment of the duty and 10*l.* (*i*)

(*m*) *Spybey v. Hide*, 1 Camp. 181.
Rivers v. Griffiths, 5 B. & A. 630. *Coore v. Callaway*, 1 Esp. 115.

(*n*) *Dent v. Dunn*, 3 Camp. 296. See *Hume v. Peploe*, 8 East. 168. 4 Leon, 209.

(*o*) See *Cole v. Blake*, Peake, 179. Bunb. 348. Fitz. Damage, 75. Bro. Ab. Taile d'Exchequer, 7. Bro. Ab. Tit. Faits, pl. 8. Fortescue, 145.

(*p*) *Stratton v. Rastall*, 2 T. R. 366. *Lampon v. Corke*, 5 B. & A. 611.

Skaife v. Jackson, 3 B. & C. 421.

Greaves v. Key, 3 B. & Adol. 313.

(*q*) Gilb. L. Ev. 142.

(*r*) *Alner v. George*, 1 Camp. 392. See *Bristow v. Eastman*, 1 Esp. 172.

(*s*) *Benson v. Bennett*, 1 Camp. 394, n. *Lampon v. Corke*, ubi supra. B. N. P. 56.

(*t*) 3 & 4 W. 4. c. 23.

(*u*) 23 G. 3. c. 49. s. 14.

(*w*) 55 G. 3. c. 55. s. 11.

BOOK THE FOURTH.

OF MERCANTILE REMEDIES.

It is proposed to treat, in this book, of *Mercantile Remedies*: that is, omitting all consideration of those universal ones, by action at law and suit in equity, which are open to merchants in common with the rest of his Majesty's subjects; to speak of such as are, from their very nature, exclusively, or almost exclusively, appropriated to that class of the community, with whom we are, in this Treatise, chiefly concerned.

CHAPTER I.

STOPPAGE IN TRANSITU.

SECT. 1. *Right to stop in Transitu—what.*

2. *Who possesses it.*

3. *How long it continues.*

4. *How defeated.*

5. *How exercised.*

SECTION I.—*Right to stop in Transitu—what.*

THE first subject which we shall place under this head, is that of *Stoppage in Transitu*; which is, indeed, a measure, rather of prevention, than of cure; but yet, sufficiently entitled to the epithet *remedial*, to justify its present collocation.

When goods are consigned on credit by one merchant to another, it sometimes happens, that the consignee becomes a bankrupt or insolvent, while the goods are on their way to him, and before they are delivered. In such case, as it would be hard that the goods of the consignor should be applied in payment of the debts of the consignee, the former is allowed by law to resume possession of them, if he can succeed in doing so while they are on their way. This resumption is called *stoppage in transitu*, and was first allowed by equity, (a) as it is now also by common law, where, on account of its remedial nature, it is regarded with considerable favor. Whether its effect be or be not to dissolve the contract of sale between the consignor and consignee of the goods stopped, is a question which has been frequently discussed, (b) particularly in *Clay v. Harrison*, 10 B. & C. 99. Lord Kenyon was of opinion that it did not rescind the sale, but was “an *equitable* lien, adopted by the law for the purposes of substantial justice;” an opinion which certainly consists best with the decisions which have taken place, that payment of part of the price, or acceptance of a bill for the whole of it, by the vendee, will not defeat the vendor’s right to stop *in transitu*, if the vendee become insolvent before the remainder of the price has been liquidated, or the bill taken up. (c)

Mr. Justice Bayley, in a modern case, (d) has given a description of the nature of a vendor’s lien for his price, wide enough to include the right of stoppage *in transitu*, and seemingly opposed to the idea that the exercise of that right operates as a rescision of the contract of sale. “The vendor’s right,” said his lordship, “in respect of the price, is not a mere lien which he will forfeit if he parts with the posses-

(a) Viz. in *Wiseman v. Vandeput*, Adol. 323. the Court adverted to it as undetermined.
 2 Vern. 203. *Snee v. Prescott*, 1 Atk. 246. and *D’Aquila v. Lambert*, 2 Eden, 75. Amb. 399. (c) *Hodgson v. Loy*, 7 T. R. 440.
Feise v. Wray, 3 East. 93.

(b) In *Stephens v. Wilkinson*, 2 B. & (d) *Bloxam v. Saunders*, 4 B. & C. 948.

sion, but grows out of his original ownership and dominion. If the seller has dispatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them *in transitu*.—Why? Because the *property* is vested in the buyer, so as to subject him to the risk of any accident, but he has not an indefeasible right to the *possession*; and his insolvency, without payment of the price, defeats that right. And if this be the case, after he has despatched the goods, and while they are *in transitu*; *à fortiori*, is it, where he has never parted with the goods, and when no *transitus* has begun. The buyer, or those who stand in his place, may still obtain the right of *possession*, if they will pay or tender the price, or they may still act upon their right of *property*, if any thing unwarrantable is done to that right. If for instance, the original vendor sell, when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury, but they can maintain no action in which the right of *property* and right of *possession* are both requisite, unless they have both those rights.”

SECTION II.—*Who possesses it.*

The person who stops goods *in transitu*, must not be a mere surety for their price, one for instance, who has, at the request of the vendee, accepted bills drawn by the vendor, for their purchase money. (e) But a person abroad, who, in pursuance of orders sent him by a British merchant, purchases goods, on his own credit, of others whose names are unknown to the merchant, and charges a commission on the price, is a consignor, so as to entitle him to stop the goods *in transitu*, if the merchant fail while they are on their pas-

(e) *Siffken v. Wray*, 6 East. 371. See *Sweet v. Pym*, 1 East. 4.

sage ; for he stands in the light of a vendor and the British merchant of *his* vendee : (*f*) and so is a person who consigns goods to be sold on the joint account of himself and the consignee. (*g*)

SECTION III.—*How long it continues.*

The period during which the right to stop the goods continues, is, as we have seen, co-extensive with that of their transit from the vendor to the purchaser. Hence, in cases where the propriety of a resumption of this sort is questioned, the point disputed generally is, whether at the time of seizure by the vendor, the transit of the goods had or had not determined. Such cases always mainly depend upon their own peculiar circumstances, but the general rule to be collected from all the decisions is, that goods are to be deemed *in transitu*, so long as they remain in the possession of the carrier, as such, whether by water or land, (*h*) even though such carrier may have been appointed by the consignee himself ; (*i*) and also while they are in any place of deposit connected with the transmission and delivery of them, (*k*) and until they arrive at the actual or constructive possession of the consignee. Thus, if goods be landed at a seaport town, and there deposited, with a wharfinger appointed by the consignee to forward them thence by land to his own residence, they are subject to the consignor's right of stoppage, while in the hands of the wharfinger. (*l*). But if a consignee be in the habit of using the warehouse of a carrier, packer, wharfinger, or other such person as his own, for instance, by making it

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| (<i>f</i>) Feise <i>v.</i> Wray, 3 East. 93. | (<i>k</i>) Stokes <i>v.</i> La Rivière, cited in |
| (<i>g</i>) Newsom <i>v.</i> Thornton, 6 East, 17. | Bothlingk <i>v.</i> Inglis, 3 East. 397. Smith |
| (<i>h</i>) Mills <i>v.</i> Ball, 2 B. & P. 457. | <i>v.</i> Goss, 1 Campb. 282. Coates <i>v.</i> |
| (<i>i</i>) Holst <i>v.</i> Pownal, 1 Esp. 240. | Railton, 6 B. & C. 422. |
| Northey <i>v.</i> Field, 2 Esp. 613. Hodgson | (<i>l</i>) Mills <i>v.</i> Ball, 2 B. & P. 457. |
| <i>v.</i> Loy, 7 T. R. 440. | |

the repository of his goods, and disposing of them there, the transit will be considered at an end when they have arrived at such warehouse; (*m*) nay, if, after goods are sold, they remain in the vendor's own warehouse, and he receives warehouse rent for them, that operates as a delivery to the purchaser, and puts an end to the right to stop *in transitu*: (*n*) and it hath been decided, that where part of the goods sold by one entire contract is taken possession of by the vendee, without any intention on the vendor's part of retaining the rest; that is to be deemed a taking possession of the whole; (*o*) though it is otherwise if there were such an intention. (*p*) And if the vendee charter a ship to convey the goods, not to himself, but to a foreign port, on a commercial speculation for his own benefit, a delivery on board that ship is, in point of law, a delivery to the vendee himself, and a determination of the transit; (*q*) for as between him and the seller, the goods have arrived at the end of their journey, and their voyage on board the chartered vessel is a new one under the direction of the purchaser.

SECTION IV.—*How defeated.*

It has been already observed, that the delivery of goods to a carrier named by the vendee, though a delivery to the vendee himself, for many purposes, is not such a one as to put an end to the right to stop them *in transitu*; and it has

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| <p>(<i>m</i>) Richardson v. Goss, 3 B. & P. 127. Scott v. Petit, 3 B. & P. 469. Forster v. Frampton, 6 B. & C. 109. Allen v. Gripper, 2 Tyrwh. R. 217. Rose v. Pickford, 8 Taunt. 83.</p> <p>(<i>n</i>) Hurry v. Mangles, 1 Camp. 452. and see Lord Ellenborough's remarks in Stoveld v. Hughes, 14 East. 308.</p> <p>(<i>o</i>) Hammond v. Anderson, 1 B. &</p> | <p>P. N. Rep. 69. and see Slubey v. Heyward, 2 H. Bl. 504, and the remarks on them in Hanson v. Meyer, 6 East. 614.</p> <p>(<i>p</i>) Bunney v. Poyntz, 4 B. & Ad. 570.</p> <p>(<i>q</i>) Fowler v. M'Taggart, cited 7 T. R. 442. 1 East. 522. and 3 East. 388.</p> |
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been ruled (though that doctrine has been questioned) that the vendee, when a particular place of delivery has been appointed, cannot anticipate the regular determination of the transit, by going to meet the goods upon their journey; (r) nor will the vendor's right be defeated by the exercise of any claim against the consignee, such for instance, as process of foreign attachment at the suit of a creditor of the vendee, (s) or the carrier's claim of a general lien for the balance due to him by the vendee. (t) We have, however, seen that the negotiation of a bill of lading, will defeat the vendor's right to stop *in transitu*; and, as the stat. 6 G. 4. c. 94. hath enacted, that any person entrusted with and in possession of any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant, or order, for the delivery of goods, shall be deemed the true owner of the goods described in the said several documents, so as to give validity to any agreement made by him for the sale and disposition of such goods, or the deposit and pledge thereof, if the buyer, disponent, or pawnee, have not notice that such person is not the actual *bonâ fide* owner: it seems to follow that the negotiation, of any of the instruments named in the act, will (subject to the other provisions thereof) defeat the vendor's right to stop *in transitu*. (u)

SECTION V.—*How exercised.*

A consignor who is desirous, and who has a right, to stop his goods *in transitu*, is not obliged to make an actual seizure of

(r) *Holst v. Pownal*, 1 Esp. 240.
 Lord Kenyon. Sed vide the observations
 of Lord Alvanley, in *Mills v. Ball*, 2 B.
 & P. 461. and those of Chambre, J. in
Oppenheim v. Russell, 3 B. & P. 54.
 See too *Foster v. Frampton*, 6 B. & C.
 107.

(s) *Smith v. Goss*, 1 Campb. 282.

(t) *Butler v. Woolcot*, 2 N. R. 64.

(u) See *Swinger v. Samuda*, Holt, N.
 P. C. 395; but see the case in bank,
 7 Taunt. 265. See *Hawes v. Watson*,
 2 B. & C. 540.

them while upon their road ; it is sufficient to give notice to the carrier in whose hands they are, on the delivery of which notice, it becomes that person's duty *to retain the goods*, so that if he afterwards, by mistake, deliver them to the vendee, the vendor may bring trover for them, (w) even against the vendee's assignees, if he himself have become bankrupt ; and the carrier, who, after the receipt of such a notice, delivers the goods to the vendee, is guilty of a tortious act, for which he may, of course, be held responsible. (x)

(w) *Litt v. Cowley*, 7 Taunt. 169. 3 East. 397. *Hunter v. Beale*, Lord

(x) *Stokes v. De la Rivière*, Lord Mansfield, cited 3 T. R. 466.

Mansfield, cited in *Bothlingk v. Inglis*,

CHAPTER II.

LIEN.

SECT. 1. *Lien—what.*2. *How acquired.*3. *How lost.*SECT. I.—*Lien—what.*

A LIEN is a right to retain property, until a debt due to the person retaining has been satisfied. (a) There are two species of liens known to the law, viz. *Particular* and *General*. Particular liens are where persons claim to retain the goods in respect of which the debt arises; and these are favored by the law. *General liens* are claimed in respect of a general balance of account, and these are to be taken strictly. (b) Where a lien exists, it is available, although the debt for which the party retaining claims to hold the goods, be of more than six years' standing, and the remedy by action at law barred in consequence by the statute of limitations. (c)

SECT. II.—*How acquired.*

The doctrine of lien originated in certain principles of the common law, by which a party who was *compelled* to receive the goods of another, was also entitled to retain them for

(a) 2 East. 235. 2 Rose, 357.

(c) Spears v. Hartley, 3 Esp. 81.

(b) Per Heath, J. 3 B. & P. 494.

Higgins v. Scott, 2 B. & Adol. 413.

his indemnity; thus carriers and innkeepers, had by the common law, a lien on the goods entrusted to their charge: (*d*) the rescuer of goods from perils of the sea, has, as we have already remarked, on grounds of public policy, a lien at common law for salvage; and it is a principle that where an individual hath bestowed labour and skill in the alteration and improvement of the properties of the subject delivered to him, he has a lien on it for his charge: thus a miller and a shipwright, (*e*) have each a lien; so has a farrier, for the expense of keeping and training a race-horse, (*f*) for he has by his instruction, wrought an essential improvement in the animal's character and capabilities. But here the rule appears to stop, and not to include cases wherein expense has been bestowed upon the object claimed to be retained, without producing any alteration in it: thus it hath been decided that a livery-stable keeper has no lien for the keep of a horse, (*g*) nor an agister for its agistment. Such is the description of a lien at common law. Whenever one of any other kind is sought to be established, the claim to it is not deduced from principles of common law, but founded upon the agreement of the parties, either expressed or to be inferred from usage. (*h*)

By special agreement.—With respect to liens by express agreement, little need be said: the question, whether one have or have not been created, depends upon the special terms of each individual contract. Where the intention of the parties to create one is plain, there can be no doubt of their legal

(*d*) *Skinner v. Upshaw*, *Ld. Raym.* 293. *Judson v. Etheridge*, 1 *Cr. & Mee.* 752. 743. but see *Taylor v. James*, 2 *Rolle's*

(*e*) *Exp. Ockenden*, 1 *Atk.* 235. *Abr.* 92. *M. pl.* 3. *Lenton v. Cook*, *B. N. P.* 45.

Franklin v. Hosier, 4 *B. & A.* 341. See *Bland Exp.* 2 *Rose*, 91.

(*f*) *Bevan v. Waters*, 1 *M. & M.* 109. *Kirkman v. Showcross*, 6 *T. R.* 236. 14.

(*g*) *Wallace v. Woodgate*, *R. & M.*

(*h*) See *Naylor v. Mangles*, 1 *Esp.*

right to carry it into effect, (i) and as they can deal as they please with their own property, they may of course frame their contract so as to exclude the right of lien, as well as to create or to extend it, and this may be done, either by direct words, or the insertion of some stipulation incompatible with the existence of a right of lien, (k) or a similar usage of trade, consistent with, and incorporated by implication into, the contract. (l) Indeed, it once was thought, that wherever there was an agreement for the payment of a fixed sum, the right of lien must be taken to have been abandoned. (m) But this doctrine, which seems unreasonable, has been overturned; and the rule now is, that the mere existence of a special agreement, will not, of itself, exclude the right of lien, but that if any of its terms be inconsistent with such right, it will do so. (n)

By Usage.—As to liens resulting from usage, these depend upon *implied*, as those last mentioned upon *express* contract. (o) The usage whence such an agreement may be implied, is either the common usage of trade, or that of the parties themselves, in their previous dealings with each other. (p) Of this description, are most general liens, none of which existed at common law, but all depend upon the agreement of the parties themselves, either expressed, or to be inferred, from their previous dealings, or from the usage of trade and the decisions

(i) See *Small v. Moats*, 9 Bingham. 574. B. N. P. 45. *Collins v. Ongley*, there cited. *Ward v. Bell*, 1 Cr. & Mee. 849.

(k) *Owenson v. Morse*, 7 T. R. 64. (n) *Chase v. Westmore*, 5 M. & S. 180. *Hutton v. Bragg*, 2 Marsh. 345. 349. 7 Taunt. 25.

(o) *Rushforth v. Hadfield*, 6 East. 519. 7 East. 224. *Kirkman v. Shawcross*, 6 T. R. 14.

(p) *Holderness v. Collinson*, 7 B. & C. 212. *per Curiam*. Exp. Ockenden,

(l) *Raitt v. Mitchell*, 4 Campb. 156.

(m) *Brennan v. Currint*, Say. R. 224.

1 Atk. 236. *Kirkman v. Shawcross*.

of the courts of law thereon. It has been settled, that an attorney has a lien for his general balance, on papers of his clients, which come to his hands in the course of his professional employment. (*q*) So a banker who has advanced money to a customer, has a lien for his general balance, (*r*) upon securities belonging to such customer, which come into his hands, but not on muniments, pledged for a specific sum, (*s*) or left casually at his shop, after his own refusal to advance money on them. (*t*) So it has been determined that calico printers, (*u*) dyers, (*v*) and wharfingers, (*w*) have liens for their general balance, but not fullers. (*x*) However, notwithstanding these decisions, it does not appear certain, that the right of *lien* may not even with respect to some of the above trades, be hereafter contested, for the court has remarked with respect to wharfingers, that there may be a usage in one place varying from that which prevails in another; (*y*) the party, therefore, claiming to retain goods for a general balance, should, in almost every instance, be prepared with evidence of the usage applicable to his own case. It is, however, established too well for dispute, that a factor has a lien upon all goods in his hands, for the balance of his general account; (*z*) and

(*q*) *Stevenson v. Blakelock*, 1 M. & S. 535.

(*r*) *Davis v. Bowsher*, 5 T. R. 488. *Bolton v. Puller*, 1 B. & P. 546. *Giles v. Perkins*, 9 East. 13. See *Bosanquet v. Dudman*, 1 Stark. 1.

(*s*) *Vanderee v. Willis*, 3 Bro. C. C. 21.

(*t*) *Lucas v. Dorrein*, 7 Taunt. 278.

(*u*) *Weldon v. Gould*, 3 Esp. 268.

(*v*) *Saville v. Burchard*, 4 Esp. 53. See also 6 East. 523; yet in other cases the evidence has been insufficient to establish it. *Green v. Farmer*, 4 Burr. 2214. *Close v. Waterhouse*, 6 East.

523, n. *Bennett v. Johnson*, 2 Chitty, 455.

(*w*) *Naylor v. Mangles*, 1 Esp. 109. *Spears v. Hartly*, 3 Esp. 81. The lien of wharfingers was said by Lord Kenyon, in *Naylor v. Mangles*, to have been proved so often that it was a settled point.

(*x*) *Rose v. Hart*, 2 B. Moore, 547.

(*y*) *Holderness v. Collinson*, 7 B. & C. 212.

(*z*) *Houghton v. Matthews*, 3 B. & P. 488. *Kruger v. Wilcox*, Ambler, 252. *Gardner v. Coleman*, cited 1 Burr. 494. 6 East. 28 n. *Man v. Shifner*, 2 East. 529.

even on the *price* of those, with the possession of which he has parted. Thus where A. consigned goods to B., a factor, to whom he owed more than their value, and B., sold them to C. to whom he was himself indebted, the factor having become a bankrupt, it was decided that he had a lien on the whole price due from C., which must consequently be placed to the credit of his assignees, in winding up his account with C., and that A. was not entitled to any portion of it. (a) But a factor has not a lien for debts, which accrued before his character as such commenced. (b) Policy brokers have also a general lien, and may avail themselves of it to obtain payment of the balance due to them from their employer, though merely an agent, if he did not disclose his principal; (c) but not if they know, or there is enough to indicate to them, his representative character. (d) Whether carriers have, by the usage of trade, a general lien, is a matter which has been of late years a good deal disputed, (e) the prevailing opinion seems to be that they have. But the master of a ship has no lien on the vessel, or her freight, either for his wages or disbursements on her account. (f)

(a) *Hudson v. Grainger*, 5 B. & A. 27. See *Drinkwater v. Goodwin*, Cowp. 251. and ante, Book I. C. 3. p. 77.

(b) *Houghton v. Matthews*, 3 B. & P. 485. See *Walker v. Birch*, 6 T. R. 258. per Lawrence, J. *Olive v. Smith*, 5 Taunt. 56. *Weldon v. Gould*, 3 Esp. 268.

(c) *Mann v. Forester*, 4 Campb. 60. *Westwood v. Bell*, *ibid.* 349. *Bell v. Jutting*, 1 Moore, 155.

(d) *Maans v. Henderson*, 1 East. 335. *Snook v. Davidson*, 2 Camp. 218, see however *Mann v. Shifner*, 2 East. 523. 529. where a broker employed by a factor, to insure, was held to have a lien on the policy, to the extent of the factor's

balance against his principal: this was on the ground that the factor had a lien, and that the broker might be considered his servant to retain the goods. See *Maccombie v. Davies*, 7 East. 7. Therefore the right of a sub-agent to retain against the principal can never extend beyond that of the immediate agent. *Solly v. Rathbone*, 2 M. & S. 298. See *Jackson v. Clarke*, 1 Y. & J. 216.

(e) *Rushforth v. Hadfield*, 6 East. 519. 7 East. 244. *Aspinall v. Pickford*, 3 B. & P. 44. n. a.

(f) *Hussey v. Christie*, 9 East. 426. 13 Ves. 594. *Smith v. Plummer*, 1 B. & A. 575.

and if the creditor refuse, after such tender, to restore it, he does so at his peril, for if the tender were sufficient in amount, he is a wrong doer, and a creditor.

SECT. III.—*How Lost.*

As a lien is a right to *retain* possession, it follows of course that where there is no possession there can be no lien. (g) It also follows that where the possession of the goods has once been abandoned, the lien is gone, but when the master of a ship, in obedience to revenue regulations, lands goods at a particular wharf or dock, he does not thereby lose his lien on them for the freight; (h) and where they are not required to be landed at any particular dock, the common practice is to land them at a public wharf, and direct the wharfinger not to part with them till the charges upon them are paid; (i) in this case the wharfinger is the ship-master's agent, and the goods remain in the constructive possession of the latter. But otherwise, the rule concerning possession is so strict, that if a party having a lien on goods, cause them to be taken in execution at his own suit, and purchase them, he so alters the nature of the possession, that his lien is destroyed though the goods may have never left his premises. (k) And if, when the goods are demanded from him, he claim to retain them on some different ground, and make no mention of his lien, he will be considered as having waived it, and the owner of the goods may sue him, without tendering a satisfaction for the debt which created his lien. (l) For it is to be remembered, that in all cases, the owner of the goods, on tendering such satisfaction, has a right to his property;

(g) *Hutton v. Bragg*, 7 Taunt. 14. *Kruger v. Wilcox*, Amb. 254. 1 Burr. 494. *Sweet v. Pym*, 1 East. 4. The peculiarity in this respect, of a vendor's lien, if it can properly be so called, for his price, has been treated of in the last chapter.

(h) *Wilson v. Kymer*, 1 M. & S. 157.

(i) *Abbott on Shipping*, 5th ed. p. 248.

(k) *Levy v. Barnard*, 8 Taunt. 149.

(l) *Boardman v. Sill*, 1 Campb. 410 n and see *Knight v. Harrison*, 2 Saund. on Pl. & Evidence, 641. and *Thompson v. Trail*, 6 B. & C. 36.

and if the creditor refuse, after such tender, to restore it, he does so at his peril, for if the tender were sufficient in amount, he is a wrong doer, and answerable for his misconduct in an action. Moreover, the possession must be *lawful*; a creditor cannot tortiously seize upon his debtor's goods, and then claim to retain them by virtue of a lien; (m) so if he abuse the goods, as for instance, by pledging them, his lien is forfeited. (n)

(m) Taylor v. Robinson, 2 Moore, 730. See Nicholls v. Clent, 8 Price, 547. (n) Scott v. Newington, 1 M. & Rob. 252. Jones v. Cliffe, 3 Tyrwh. 577.

CHAPTER III.

BANKRUPTCY.

SECT. 1. *Who may be a Bankrupt.*

2. *How he may become Bankrupt.*

3. *Proceeding consequent on Bankruptcy.*

THE last subject on which we shall treat is that of bankruptcy. The Legislature, considering that men engaged in mercantile pursuits, must, of necessity, be more often and more largely indebted than other persons; considering also, that it would be unfair to creditors, and injurious to the interests of commerce, to allow a failing trader to select some favoured claimant, and liquidate his demand at the expense of the rest; has enacted a series of regulations called the Bankrupt laws, which insure to the creditors of an insolvent trader an impartial distribution of their debtor's property, if they will take the right steps to obtain it; while, in order to prevent a trader, really in a state of hopeless insolvency, from continuing to speculate and deceive others, until he has consumed the last remnant of his effects, and left nothing to be shared among his creditors, it is directed that certain acts, if done by him, shall be looked on as conclusive evidence, that he is in such a condition as entitles his creditors to proceed against him under the bankrupt laws: these acts, the nature of which will be presently explained, are therefore called, *acts of bankruptcy*; the trader who has committed one of them is, from that time forth, a *bankrupt*; and if proceedings be not thereupon taken against him, it is only in consequence of the ignorance, indisposition, or good nature of his creditors.

But as it would be inhuman to reduce a trader, whose failure is imputable, less to his fault, than his misfortune, to perfect destitution; by stripping him of all the remnant of his pro-

perty ; he is, except in cases of misconduct, allowed a sum of money, out of the produce of his own effects, for his future support, and to put him in the way of honest industry ; and this sum is proportioned to the value of his property as compared to his debts, so that additional inducement is thus held out, to fair dealing, and an early disclosure of his embarrassment. Besides this, he has an indemnity granted him of being free and discharged for ever, from all debts owing by him at the time when he became a bankrupt. So that he is a clear man once again ; and by the assistance of his allowance, and his own industry, may become a useful member of the commonwealth. And thus we see that, as upon the one hand, the bankrupt law is a law of severity, inasmuch as it compels a total cession of the bankrupt's property, whether he will or no, and subjects him, as we shall hereafter observe, to very heavy punishment, in case of misconduct ; so, upon the other hand, it is a law of mercy, rescuing him from the pressure of embarrassment, which might otherwise have damped his spirits, and crippled his future exertions, and providing him with the means of re-commencing his trade, and again claiming the support of former connexions ; who, if during the legal scrutiny to which it is subjected, his conduct prove to have been blameless, are, as we find from experience, often very forward to assist him.

From what is above said, it will appear, that the policy of the bankrupt law comprehends two grand objects. 1st. The distribution of the effects of the debtor, in the most expeditious, equal, and economical mode. 2nd. The liberation of his person from the demands of his creditors, after he has made a full surrender of his property.

I shall consider this subject in the following order of topics.

1. Who may be a bankrupt.
2. How he may become a bankrupt.
3. The proceedings on a bankruptcy.

SECTION I.—*Who may be a Bankrupt.*

Any person whatever, who is capable of binding himself by contracts, may, if he do such acts as constitute a *trading* within the meaning of the bankrupt laws, become a bankrupt: thus, a clergyman, a public officer, or the servant of an ambassador, may become bankrupt. (a) An infant, however, cannot be a bankrupt, (b) for his contracts are all voidable; neither can a *feme covert*, for her's are void, except in cases where she might be sued at law as a *feme sole*, *ex. gr.* where the husband is civilly dead, as if he be transported, (c) or where she is a sole trader by the custom of London, in which case she may be a bankrupt with respect to her separate effects in trade. (d)

In order that a person should become subject to the bankrupt laws, it is further necessary that he should be a *trader*. Stat. 6 G. 4. cap. 16. sect. 2. enacts on this subject,

“ That all bankers, (e) brokers, (f) and persons using the trade or profession of a scrivener, (g) receiving other men's monies or estates into their trust or custody, and persons insuring ships or their freight, or other matters, against perils of the sea, warehousemen, wharfingers,

(a) *Hankey v. Jones*, Cowp. 745. *Highmore v. Molloy*, 1 Atk. 256. 7 Ann. c. 12. s. 5.

(b) *Belton v. Hodges*, 9 Bingh. 372. *Exp. Sydebotham*, 1 Atk. 146. *Exp. Barwis*, 6 Ves. 601. *Exp. Moule*, 14 Ves. 603. See 1 V. & B. 494.

(c) *Exp. Franks*, 7 Bingh. 762. See *Marshall v. Rutton*, 8 T. R. 545. *Williamson v. Dawes*, 9 Bingh. 293.

(d) *Exp. Carrington*, 1 Atk. 206. *Lavie v. Phillips*, 1 Bl. 570, 3 Burr. 1776.

(e) A party to be a banker need not

keep an open shop. *Exp. Wilson*, 1 Atk. 218.

(f) This word includes pawnbrokers. *Highmore v. Molloy*, 1 Atk. 206. *Rawlinson v. Pearson*, 5 B. & A. 124; and shipbrokers, *Pott v. Turner*, 6 Bingh. 702.

(g) A scrivener is a person intrusted with the money of his employer, to lay it out for him as occasion offers. See 3 Camp. 534. *Harrison v. Harrison*, 2 Esp. 555. *In re Warren*, 2 Sch. & Lef. 414. *Exp. Paterson*, 1 Rose, 402. *Hutchinson v. Gascoigne*, 1 Holt, 507. *Hurd v. Bridges*, *ibid.* 654.

packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels, (*h*) or coffee-houses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using the trade of merchandize by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail; and all persons who, either for themselves or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by workmanship of goods or commodities, shall be deemed traders liable to become bankrupt: Provided that no farmer, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member of, or subscriber to, any incorporated, commercial, or trading companies, established by charter or act of Parliament, shall be deemed as such a trader liable by virtue of this act to become bankrupt."

It will be seen, that this section, after specifying certain particular occupations, which it directs shall be considered *trades*, proceeds to include others, not comprised within that specification, by the general words, "*all persons*," &c.

In order to constitute a *trading*, such as is here contemplated, the *quantum* of actual dealing is immaterial, provided it be carried on with the intent of dealing *generally*, (*i*) *ex. gr.* of supplying any one who will come to buy. I say, of dealing *generally*, for a person is not a *trader* by such occasional acts as a schoolmaster's selling books to his own scholars, or a person who finds that he has bought more of an article than he wants, selling the surplus. (*k*) Again, if the buying and selling be only incident to, and a mode of, the enjoyment of real property, it will not be a *trading*, as where a man makes bricks, raises minerals, or manufactures lime, and alum, on

(*h*) A lodging-house keeper, who sells her guests food for profit, is within this word. *Smith v. Scott*, 9 Bingh. 15.

(*i*) *Cannan v. Denew*, 10 Bingh. 292. *Patman v. Vaughan*, 1 T. R. 572. *Exp. Blackmore*, 6 Ves. 3. *Exp. Moule*, 13 Ves. 603. *Exp. Magennis*, 1 Rose, 84. *Newland v. Bell*, 1 Holt, 441. *Milliken v. Brandon*, 1

C. & P. 380. *Doe v. Lawrence*, 2 C. & P. 135. See *Gale v. Halfknight*, 3 Stark. 56.

(*k*) *Valentine v. Vaughan*, Peake, 76. *Gibbins v. Thompson*, 1 Vent. 270. *Summersett v. Jarvis*, 3 B. & B. 2. *Bolton v. Sowerby*, 11 East. 276. *Carter v. Dean*, 1 Swanst. 64. *Hankey v. Jones*, Cowp. 745.

his own grounds ; though, in all cases, if such pursuit be carried on as a substantive and independent trade, it will fall within the statute. (*l*) When the executor of a trader disposes of his testator's stock, that does not render himself a trader, even though he purchase other ingredients to make it marketable. But if he increase the stock, and continue to sell, he becomes a trader ; (*m*) and if, in doing so, he act without authority, or beyond his authority, the assets improperly consumed, may be proved as a debt under his commission. (*n*) As to the period at which a person, once a trader, may cease to be so, that depends on his own intention in discontinuing the practice of his trade ; and it is for a jury to decide whether he meant to abandon, or to exercise, or resume it. (*o*) It is not necessary that the trade should be *legal*, (*p*) nor that it should be carried on *in* England, it is enough if it be *to* England. (*q*)

SECTION II.—*How a man may become Bankrupt.*

We now pass to the consideration of the question, how may a trader become bankrupt. The answer to which is—By committing one of those acts which the law has deno-

(*l*) See *Sutton v. Weeley*, 1 East. 442. *Exp. Gallimore*, 2 Rose, 424. *Paul v. Dowling*, 1 M. & M. 267. *Heane v. Rogers*, 9 B. & C. 578. *Exp. Burgess*, 2 G. & J. 183. *Newton v. Newton*, Co. B. L. 66. *Exp. Ridge*, 1 Rose, 316. 1 V. & B. 360. *Exp. Gardner*, 1 Rose, 377. *Crawshay v. Maule*, 1 Swanst. 492. *Stewart v. Ball*, 2 N. R. 78. *Exp. Gibbs*, 2 Rose, 38.

(*m*) *Exp. Nutt*, 1 Atk. 102. *Hankey v. Towgood*, Cook, 67. *Viner v. Cadell*, 2 Esp. 88. *Exp. Garland*, 10 Ves. 120.

(*n*) *Exp. Garland*, 10 Ves. 110. *Exp. Richardson*, Buck. 202. 421.

(*o*) *Exp. Paterson*, Rose, 402. *Wharam v. Routledge*, 5 Esp. 235. *Heany v. Birch*, 3 Camp. 233. *Exp. Cundy*, 2 Rose, 357. Vide *Rawlinson v. Pearson*, 5 B. & A. 124.

(*p*) *Exp. Meymott*, 1 Atk. 197. *Cobb v. Symonds*, 5 B. & A. 516. *Wright v. Bird*, 1 Price, 20.

(*q*) *Dodsworth v. Anderson*, T. Raym. 375. *Bird v. Sedgwick*, Salk. 110. *Alexander v. Vaughan*, Cowp. 398. *Allen v. Cannon*, 4 B. & A. 418.

minated acts of bankruptcy: these, we will now enumerate, premising that they have been divided by a learned author, (r) into two classes:

1. Those acts, which are only acts of bankruptcy, if done by the trader *with intent to defeat or delay his creditors in the recovery of their debts.*

2. Those, the intent of which is immaterial.

The former class of acts of bankruptcy, are enumerated in the third section of 6 G. 4. c. 16. which enacts,

“That if any such trader shall depart this realm, or being out of this realm shall remain abroad, or depart from his dwelling house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money, or chattels to be attached, sequestered, or taken in execution, or make, or cause to be made, either within this realm, or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make, or cause to be made, any fraudulent surrender of any of his copyhold lands or tenements, or make, or cause to be made, any fraudulent gift, delivery, or transfer, of any of his goods or chattels; every such trader, doing, suffering, procuring, executing, permitting, making, or causing to be made, any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy.”

We will consider these in order:

1. *Departing the realm.*—The departure must be coupled with an intent, at the moment of departure, to delay creditors. (s) If such an intention exist, it is not necessary that a delay should actually have taken place. (t) In some cases, where the trader has gone abroad under circumstances which rendered it highly improbable that he would return to this

(r) Lord Henley.

5 Ves. 576. Exp. Osborne, 1 V. & B.

(s) Exp. Gulston, 1 Atk. 193. Fowler
v. Padget, 7 T. R. 509. Exp. Mutrie,

177. Warner v. Barber, 1 Holt. 175.

(t) Robertson v. Liddell, 9 East. 487.

country, *ex. gr.* where he had committed murder, it will be inferred that he must have intended to delay his creditors, such being the necessary consequence of his behaviour. (u)

2. *Being out of the realm, shall remain abroad.*

3. *Or depart from his dwelling house.*—As in the case of *departure from the realm*, there must be an intent, at the moment of departure, to delay creditors; and if there be such an intent, there need not be an actual delay. (w) It seems that if a trader were to depart his dwelling house, with intent to delay creditors in case a certain event should happen, which event, however, did not happen, that could not be an act of bankruptcy. (x)

4. *Otherwise absent himself.*—These words are somewhat extensive in their signification; they are not confined to an absenting from the dwelling house; if he absent himself from any place, in order to delay his creditors, such an absenting, will constitute an act of bankruptcy, within this phrase. George being in dread of a *ca. sa.* came to the lower end of Chancery-lane, and having beckoned to an officer in the sheriff's office, which is higher up in Chancery-lane, and is in Middlesex, enquired whether a *ca. sa.* had issued, and informed him *that his reason for beckoning to him instead of going to the office, was to avoid being arrested under the ca. sa., if it had issued.* He was held to have committed an act of bankruptcy by *absenting himself.* (y) In like manner,

(u) Woodier's case, B. N. P. 39.
Raikes v. Poreau, Co. B. L. 5th ed. 73.
Vernon v. Hankey, Co. B. L. 5th ed. 98.
See these cases explained in Fowler v.
Padget, 7 T. R. 509.

(w) Wilson v. Norman, 1 Esp. 334.
Hammond v. Hicks, 5 Esp. 139. Hol-
royd v. Whitehead, 3 Camp. 530. Exp.

Wydown, 14 Ves. 84. Exp. Bamford,
14 Ves. 449. Deffle v. Desanges,
8 Taunt. 671. See Holroyd v. Gwyn,
2 Taunt. 176. Spencer v. Billing, 3 Camp.
312. Bigg v. Spooner, 2 Esp. 651.

(x) Fisher v. Boucher, 10 B. & C.
711.

(y) Robson v. Rolls, 9 Bingh. 650.

a trader may commit an act of bankruptcy, by absenting himself from his own regular place of business, in which a man would be expected to be, or from some other place where he expected to meet those to whom he was indebted; for instance, the Royal Exchange, (z) in order to delay his creditors. But the mere fact of a trader's absenting himself from a place at which, though he had once transacted business there, it did not appear that he had any business to transact at the time of his staying away from it, and at which, therefore, he would not, in the ordinary course of things, be expected to be present, will not warrant a jury in concluding that he had committed an act of bankruptcy, by absenting himself, in order to delay creditors. (a)

5. *Begin to keep his house.*—The keeping house must be with the intention to delay a creditor; in the absence of such intention, it is not sufficient to make it an act of bankruptcy that a creditor has, in fact, been delayed. But if there be such an intention, it is an act of bankruptcy, whether the trader keep house for an hour, or a day; and whether any creditor was delayed or no. (b) The usual evidence of this act, is a denial to a creditor. Such denial is not in itself an act of bankruptcy, it is only evidence of one, and therefore may be explained; for instance, it may be shewn that he was sick in bed, or engaged with company: (c) on the other hand, it is not the only evidence, and the trader may, therefore, be shewn to have *kept house*, by other means: thus, if he shut himself up in his house, debarring all access

(z) See *Maylin v. Egloe*, Str. 809. *Bigg v. Spooner*, 2 Esp. 651. *Bayley v. Schofield*, 1 M. & S. 338. *Judine v. Da Cossens*, 1 N. R. 234. *Chenoweth v. Hay*, 1 M. & S. 676. *Gillingham v. Laing*, 6 Tannt. 532.

(a) *Bernasconi v. Farebrother*, 10 B. & C. 549.

(b) See *Heyler v. Hall*, Palmer, 325.

(c) *Round v. Hope*, Co. B. L. 5th ed. 94. B. N. P. 39, 40. Exp. *Preston*, 1 Rose, 21. Exp. *Hall*, 1 Atk. 201. *Smith v. Currie*, 3 Camp. 349. *Shew v. Thompson*, 1 Holt. 159. Sed vide *Lazarus v. Waithman*, 5 Moore. 363.

to it, whereby his creditors are delayed, an act of bankruptcy may be established by proof of his having done so; and, generally, if a trader seclude himself in his house to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, he begins to keep his house, and commits an act of bankruptcy. (d) A creditor having gone to Shirwin's house to demand money, and being told that he was not at home, grew very boisterous, when Mrs. Sherwin appeared, and having endeavoured in vain to appease him, Sherwin was at length seen peeping over his wife's shoulder. Another creditor having called for his debt, Sherwin appeared from behind a partition in the back of the shop, but seeing the witness, immediately retired; and Mrs. Sherwin, who came forward, said her husband was not at home. It was held, that the jury were properly directed to consider whether Sherwin had *wilfully secluded himself*, that is, had withdrawn *from a part of the house where he was likely to meet with creditors, to a more retired part*; and that if he had done so, that would be an act of bankruptcy. (e) A mere direction by a trader to deny him to a creditor, if he do no further act indicative of keeping house, such for instance, as secluding himself, is not *per se*, an act of bankruptcy: (f) neither on the other hand, is a denial, if he did not order it. (g) And it has been laid down, that such denial must be to a creditor who has a debt actually due, and that a debt payable *in futuro*, is not sufficient. (h) If a trader order himself to be *generally* denied, and be in consequence de-

(d) See *Dudley v. Vaughan*, 1 Camp. 272. *Bailey v. Schofield*, 1 M. & S. 338. *Cumming v. Bailey*, 6 Bingh. 363; and the observations of the Judges in *Fisher v. Boucher*, 10 B. & C. 712.

(e) *Key v. Shaw*, 8 Bingh. 323.

(f) *Fisher v. Boucher*, 10 B. & C. 712. *Garret v. Moule*, 5 T. R. 575.

(g) *Dudley v. Vaughan*, 1 Camp. 272. *Exp. Foster*, 17 Ves. 416.

(h) See *Exp. Levi*, 7 Vin. 61. pl. 14. See *Colkitt v. Freeman*, 2 T. R. 59. *Jackmar v. Nightingale*, B. N. P. 40. and MSS. in note to that case by Mr. Bridgman. *Jeffs v. Smith*, 2 Taunt. 401. *Exp. Bamford*, 15 Ves. 451.

nied to a creditor, that is sufficient, though it was not that creditor, but another, whom he intended to avoid. (i)

6. *Suffer himself to be arrested for any debt not due.*

7. *Yield himself to prison.*—*Ex. gr.* where, being arrested, though he had enough to pay the debt, he chose to go to prison, in order, as he declared, to force his creditors to accept of a composition. (k)

8. *Suffer himself to be outlawed.*—This act must also be done with intent to delay creditors. (l)

9. *Procure himself to be arrested, or his goods, money, or chattels to be attached or sequestered.*—These words refer to that species of process only, by which suits are commenced. (m)

10. *Or taken in execution.*—The words have consequently been added by the legislature.

11. *Make either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make any fraudulent surrender of his copyhold lands or tenements, or make any fraudulent gift, delivery, or transfer of any of his goods or chattels.*(n)—A grant conveyance, gift, transfer, surrender, &c. if fraudulent, which we observe it must be, that it may constitute an act of bankruptcy within this section, is either fraudulent, within stat. 13 Eliz. c. 5. or fraudulent on account of its con-

(i) *Mucklow v. May*, 1 Taunt. 479.

(k) *Exp. Barton*, 7 Vin. Abr. tit. Cr. & Bankrupt, 61, 62. pl. 15.

(l) *Bradford v. Bloodworth*, 1 Keb. 11. 1 Lev. 13. *

(m) *Clavey v. Haley*, Cowp. 428. *Harman v. Spottiswood*, Co. B. L. 5th ed. p. 100.

(n) A bill of exchange is a chattel within these words, *Cumming v. Baily*, 6 Bingh. 368.

travening the policy of the bankrupt laws, which seeks, as we must recollect, the equal distribution of the bankrupt's property among his creditors. With respect to the cases on the statute of Elizabeth, they depend each on its own particular circumstances. Where there has been a transfer or assignment of goods, but the transferor or assignor continues in possession of them after such transfer or assignment, that is a badge or evidence of fraud, if the continuance of possession be inconsistent with the purport of the assignment ; (o) and it was once held by Lord Ellenborough, that the transferor remaining in possession, even concurrently with the transferee, would be a mark of fraud. (p) However, the want of transfer of possession, though evidence, is in no case conclusive evidence, of fraud, (q) and if consistent with the purport of the assignment, seems not to warrant any imputation thereof. (r) And there are many other ways of rebutting the imputation of fraud ; *ex. gr.* if the assignment to the transferee take place under circumstances of such notoriety as concur at a sheriff's sale, (s) or at an auction. (t) In short, though there is always reason for suspicion, where an assignor, who is under pecuniary embarrassments, remains in possession of the property assigned, yet such suspicion of fraud is open to be rebutted, and if it can be rebutted, the assign-

(o) *Twyne's case*, 3 Rep. 80 b. *Edwards v. Harben*, 2 T. R. 587. In *Worseley v. Demattos*, 1 Burr. 467, Lord Mansfield assigns as a reason for this, that the assignor, by remaining in possession, obtains a false credit in the world.

(p) *Wordall v. Smith*, 1 Camp. 332. See vide *Benton v. Thornhill*, 7 Taunt. 149. *Latimer v. Batson*, 4 B. & C. 653. *Eastwood v. Brown*, R. & M. 313.

(q) *Martindale v. Booth*, 3 B. & Ad. 498.

(r) In *Martindale v. Booth*, ubi supra. *Reid v. Wilmot*, 7 Bingh. 577. See B. N. P. 258. *Steel v. Brown*, 1 Taunt. 381.

(s) *Kidd v. Rawlinson*, 2 B. & P. 59. *Watkins v. Birch*, 4 Taunt. 823. *Latimer v. Batson*, 4 B. & C. 652. See *Willies v. Farley*, 3 C. & P. 395.

(t) *Leonard v. Baker*, 1 M. & S. 251. *Jeseph v. Ingram*, 1 B. & Moore, 189. See *Guthrie v. Wood*, 1 Stark. 367.

ment is not void. (*u*) We shall, however, presently see that property in this situation may become lost to the transferee, and pass to the bankrupt's assignees, upon another ground, namely, that of its being in his ordering and disposition at the time of bankruptcy.

Generally speaking, a debtor has a right to prefer one creditor to another; (*w*) and therefore, though an assignment by a trader, of all his effects, or of all, with a nominal exception, to a creditor, is void, and an act of bankruptcy, on the ground of its contravening the policy of the bankrupt law; yet it would not be void, under the statute of Elizabeth: and we shall see, that an assignment of *part* of his property to a creditor, even though made by a trader, is good, unless he made it voluntarily, and in contemplation of bankruptcy.

There are some acts, which, if done by private persons, would be valid, but when done by a trader, are deemed fraudulent, on account of their contravention to the policy of the bankrupt law. In the first place, it was long ago well settled, that an assignment, by a trader, of his whole property, or of the whole, with some exception merely nominal and insufficient to enable the trader to continue his business, upon account of a by-gone and before contracted debt, carried in itself evidence of fraud, and was an act of bankruptcy. (*x*) So far does this doctrine extend, that if a trader convey his property to trustees, such conveyance, though it be for the

(*u*) See *Eastwood v. Brown*, R. & M. 312. *Hoffman v. Pitt*, 5 Esp. 25. *Benton v. Thornhill*, 7 Taunt. 149. *Manton v. Moore*, 7 T. R. 70.

(*w*) *Pickstock v. Lyster*, 3 M. & S. 371. *Holbird v. Anderson*, 5 T. R. 235. *Meux v. Howell*, 4 East. 1. *Eastwick v. Cuilland*, 5 T. R. 420. *Bowen v. Bramidge*, 6 Car. & P. 142.

(*x*) *Wedge v. Newlyn*, 4 B. & Adol.

831. *Newton v. Chantler*, 7 East. 137. *Worsley v. Demattos*, 1 Burr. 467. *Wilcox v. Day*, 2 Burr. 477. *Compton v. Bedford*, 1 Bl. 362. *Exp. Foord*, 1 Burr. 477. *Law v. Skinner*, Bl. 996. See *Berney v. Davison*, 1 B. & B. 408. *Berney v. Vyner*, 1 B. & B. 482. *Hooper v. Smith*, 1 W. Bl. 442. As to assignments, not on account of by-gone debts, vide post.

benefit of all his creditors, is an act of bankruptcy; (*y*) nor will such its effect be prevented, by the insertion of a proviso that it shall be void if the trustee think fit, (*z*) or if all creditors above twenty pounds should not execute, or a commission of bankruptcy should issue within a certain time; (*a*) nor by the fact of its nonexecution by the trustees; (*b*) though if it cannot operate till executed by three persons, it is not an act of bankruptcy when executed only by one. (*c*) It is held, indeed, that neither a creditor who has executed, or been privy to, or acted under such a deed, nor any person as his representative, can afterwards set it up as an act of bankruptcy. (*d*) But as it is impossible to ascertain that all the trader's creditors have assented, and as any creditor to a sufficient amount who has not assented, can, by suing out a fiat, nullify the whole proceedings; it was extremely dangerous to purchase property conveyed by such a deed, from the trustees; and many compositions, which would otherwise have been eligible, were thus defeated or prevented: this mischief is, however, remedied by stat. 6. G. 4. c. 16. s. 4. which enacts.

“ That where any such trader shall, after this act shall have come into effect, execute any conveyance or assignment, by deed, to a trustee or trustees, of all his estate and effects for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a commission issue against such trader within six calendar months from the execution thereof by such trader; provided that such deeds shall be executed by every such trustee within fifteen days after the execution thereof by the said trader, and that the execution by such trader and by

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| (<i>y</i>) Kettle <i>v.</i> Hammond, Co. B. L. | Exp. Cawkwell, 1 Rose, 313. Exp. |
| 100. Echardt <i>v.</i> Wilson, 8 T. R. 140. | Crawford, 1 Christ. 137. 182. Back <i>v.</i> |
| (<i>z</i>) Tappenden <i>v.</i> Burgess, 4 East. | Gooch, 1 Holt, 13. 4 Camp. 232. |
| 230. | Hicks <i>v.</i> Burfitt, ib. 235 n. Exp. Shaw, |
| (<i>a</i>) Dutton <i>v.</i> Morrison, 17 Ves. 190. | 1 Madd. 598. Exp. Kilner, Buck. 104. |
| (<i>b</i>) Simpson <i>v.</i> Sikes, 6 M. & S. 312. | Exp. Battier, Buck. 426. Not even since |
| (<i>c</i>) Dutton <i>v.</i> Morrison, 17 Ves. 190. | stat. 1 & 2 W. 4. c. 56. s. 42. Marshall |
| (<i>d</i>) Bamford <i>v.</i> Baron, 2 T. R. 594 n. | <i>v.</i> Barkworth, 4 B. & Ad. 513. |

every such trustee be attested by an attorney or solicitor; and that notice be given within two months after the execution thereof by such trader, in case such trader reside in London, or within forty miles thereof, in the London Gazette, and also in two London daily newspapers; and in case such trader does not reside within forty miles of London, then in the London Gazette, and also in one London daily Newspaper, and one provincial newspaper, published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee, and of such attorney or solicitor."

An assignment of part of a trader's effects, even on account of a by-gone and before contracted debt, does not, like an assignment of the whole, carry with it any intrinsic evidence of fraud; since every trader must, in the course of his business, have power to make over some parts of his property to creditors. But though not fraudulent or void *per se*, yet if made in contemplation of bankruptcy, and with an intent to give the transferee an undue advantage over other creditors, it is fraudulent and void; (e) and though not formerly so, is now, by the section we are considering, an act of bankruptcy. Whether an act be or be not of this description, in other words, whether it be or be not a *fraudulent preference*, must be ascertained by putting it to a jury to say whether the transfer, delivery, &c. were made in contemplation of bankruptcy, *and* voluntarily, or under fear or compulsion. (f)

(e) And that although it took place more than two months before commission issued, notwithstanding 6 G. 4. c. 16. s. 81. *Bevan v. Nunn*, 9 Bingham. 107.

(f) *Belcher v. Prittie*, 10 Bingham. 408. *Cook v. Rogers*, 7 Bingham. 445. *Fidgeon v. Sharp*, 5 Taunt. 539. *Morgan v. Brundrett*, 2 Nev. & Mann. 280. *Bevan v. Nunn*, 9 Bingham. 107. *Hartshorne v. Slodden*, 2 B. & P. 582. *Gibbon v. Phillips*, 7 B. & C. 529. *Poland v. Glyn*, 4 Bingham. 92 n. *Hock v. Jones*,

4 Bingham. 20. *Wheelwright v. Jackson*, 5 Taunt. 109. *Moore v. Barthrop*, 1 B. & C. 5. *Crosby v. Crouch*, 11 East. 261. *Thompson v. Freeman*, 1 T. R. 155. *Smith v. Payne*, 6 T. R. 152. *Bayley v. Ballard*, 1 Camp. 416, doubted in *Cook v. Rogers*, by Park, J. *Singleton v. Butler*, 2 B. & P. 283. *Churchill v. Crease*, 5 Bingham. 177. *De Tastet v. Carroll*, 1 Stark. 88. *Morgan v. Horseman*, 3 Taunt. 241.

In order to make the delivery fraudulent, it must not only have been made at a time *when the trader contemplated the event of his own bankruptcy*, but it must also have been *voluntary*; and therefore, a delivery under the threat or apprehension of criminal or civil process, is valid. This distinction, viz. between a voluntary transfer in contemplation of bankruptcy, and a transfer, either voluntary but not in contemplation of bankruptcy: or in contemplation of bankruptcy, but involuntary and under the pressure of threat or compulsion: is the distinction upon which all the modern cases turn. Several of these are referred to in the margin, but the dependance of each, on its own peculiar circumstances, renders it impossible to give a full account of them. The declarations of the trader, at the time of the transfer, or connected with it, are admissible evidence to shew the intention with which it was made. (g)

It has been said by Lord Kenyon, that all the cases, without a single exception, where the assignment of his property by a trader had been deemed fraudulent and an act of bankruptcy, were cases where it had been given for a *by-gone* and before contracted debt; but that it never could be taken to be law, that a trader could not *sell* his property when his affairs became embarrassed, or assign them to a person who would assist him in his difficulties, as a security for any advances such person might make to him. (h) On the other hand, as a *sale*, even of part of the trader's property, is a *transfer*, it is clear that it *may* come within the provisions of the statute as a *fraudulent transfer*; but though it may do so, it is not from its nature exposed to the same suspicion as most other transactions, and a sale cannot in reason be held to be a fraudulent transfer, unless it takes place under such circumstances, that the buyer, as a man of business and under-

(g) Ridley v. Gyde, 9 Bingham 349. 72. See Berney v. Davison, 1 B. & B. 408. See Phillips v. Eamer, 2 Esp. 357. Berney v. Vyner, 1 B. & B. 482.

(h) Whitwell v. Thompson, 1 Esp.

standing, ought to suspect and believe that the seller means to get money by it for himself, in fraud of his creditors; and that the sale is made for that purpose; as for instance, where the buyer, as a man of business, must know that he is purchasing the goods much below their real value. (i)

This doctrine, with regard to sale, has been carried yet further in several late cases, which seem to have decided that if a *bonâ fide agreement* be entered into, by which a trader contracts for valuable consideration, to transfer to another person, property, or a fund, which the trader, though he has it not in his present possession, will be entitled to receive at some future period, such agreement will operate as an equitable assignment of that property or fund, and will entitle the transferee to receive it, whatever may be the state of the trader's affairs between the time of the agreement and of the transferee's claim of possession. (k) It appears, however, that there is a difference between such an assignment of chattels specifically ascertained, and one of chattels not specifically ascertained; and that in the latter case the remedy of the assignee, if indeed he has any, is in equity. (l) But though this be the rule with regard to chattels; with regard to money, the rule seems to be, that it is sufficient to render the assignment valid, if the debt assigned be not larger than the sum due to the assignee by the party assigning: (m) but for a reason which will hereafter be explained, immediate notice of the equitable transfer ought to be given to the debtor. (n)

(i) *Cook v. Caldecott*, 1 M. & M. 524. *Ward v. Clark*, *ibid.* 499. *Cash v. Young*, 2 B. & C. 413. See *Hill v. Farnell*, 9 B. & C. 45. *Bishop v. Crawshay*, 3 B. & C. 415.

(k) *Hunt v. Mortimer*, 10 B. & C. 45. *Vacher v. Cocks*, 1 B. & Ad. 145.

Crowfoot v. Gurney, 9 Bingham. 377. *Douglas v. Russell*, 4 Simon, 524.

(l) *Carvalho v. Burn*, 4 B. & Adol. 396.

(m) *Crowfoot v. Gurney*, 9 Bingham. 377.

(n) See *Dean v. James*, 1 Nev. & Mann, 392.

We now proceed to consider those acts which do not derive the character of acts of bankruptcy from the intent with which the trader committed them.

By stat. 6 G. 4. c. 16. s. 65. it is enacted,

“That if any such trader, having been arrested or committed to prison for debt, or on any attachment for non-payment of money, shall, upon such or any other arrest or commitment for debt, or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days, or having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him, and not discharged, every such trader shall be thereby deemed to have committed an act of bankruptcy; or if any such trader, having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention: provided, that if any such trader shall be in prison at the time of the commencement of this act, such trader shall not be deemed to have committed an act of bankruptcy by lying in prison, until he shall have lain in prison for the period of two months.”

It will be observed that this section points out two acts: *First*, That of *lying in prison twenty-one days*, under certain circumstances. *Secondly*, That of *escaping out of prison*. When the former of these acts has been committed, the trader committing it is deemed to be a bankrupt from the expiration of the twenty-one days mentioned by the act. Where the second, namely, an escape, has been committed, the trader committing it is deemed a bankrupt from the time of the arrest, commitment, or detention. (o)

The *debt* mentioned in this section, must be a real subsisting *legal* debt; a mere equitable demand is not sufficient; (p) a penalty due to the crown is. (q)

The time of *lying in prison* commences from the first arrest,

(o) Moser v. Newman, 6 Bingh. 556. (p) Exp. Hilyard, 1 Atk. 147. 2 Ves. Higgins v. M'Adam, 3 Y. & J. 1. 407. Co. B. L. 108. (q) Cobb v. Symonds, 5 B. & A. 516.

the day of arrest being included; (*r*) in case of a surrender in discharge of bail, from the surrender; (*s*) unless the surrender were merely *pro forma*, the defendant never having been out of custody since the arrest, in which case the time runs from the arrest, (*t*) as it will, if he have, in consequence of sickness, been kept part of the time at his own house, (*u*) or have had the benefit of day rules during the period. (*w*) But where he had been suffered to go at large after the arrest, the time was computed from his return into custody. (*x*) *The escape* intended in this section must not be one by mere construction, but such a one as manifests an intention on the debtor's part to run away. (*y*)

By 6 G. 4. c. 16. sect. 6. it is enacted,

“That if such trader shall file in the office of the Lord Chancellor's Secretary of Bankrupts, a declaration in writing, signed by such trader, and attested by an attorney or solicitor, that he is insolvent, or unable to meet his engagements, the said secretary of bankrupts or his deputy shall sign a memorandum that such declaration hath been filed, which memorandum shall be authority for the printer of the London Gazette to insert an advertisement of such declaration therein; and every such declaration shall, after such advertisement inserted as aforesaid, be an act of bankruptcy committed by such trader at the time when such declaration was filed; but no commission shall issue thereupon, unless it be sued out within two calendar months next after the insertion of such advertisement, and unless such advertisement shall have been inserted in the London Gazette within eight days after such declaration was filed; and no docket shall be struck upon such act of bankruptcy before the expiration of four days next after insertion of such advertisement, in case such commission is to be executed in London, or before the expiration of eight days next after such insertion, in case such commission is to be executed in the country; and the Gazette containing such adver-

(*r*) *Glassington v. Rawlins*, 3 East. 407. 3 Stark. 73.

(*s*) *Tribe v. Webber*, Willes, 464.

(*t*) *Ross v. Green*, 1 Burr. 437.

(*u*) *Stevens v. Jackson*, 4 Camp. 164. 6 Taunt. 106.

(*w*) *Soames v. Watts*, 1 C. & P. 400.

(*x*) *Barnard v. Palmer*, 1 Camp. 509.

(*y*) *Ross v. Green*, 1 Burr. 437.

tisement shall be evidence to be received of such declaration having been filed."

And by sect. 7,

"That no commission under which the adjudication shall be grounded on the act of bankruptcy, being the filing of such declaration, shall be deemed invalid by reason of such declaration having been concerted or agreed upon between the bankrupt and any creditor or other person."

By 6 G. 4. c. 16. sect. 8. it is enacted,

"That if any such trader, liable by virtue of this act to become bankrupt, shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debts than the other creditors, such payment, gift, delivery, satisfaction, or security shall be an act of bankruptcy; and if any commission shall have issued upon the docket so struck as aforesaid, the Lord Chancellor may either declare such commission to be valid, and direct the same to be proceeded in, or may order it to be superseded, and a new commission may issue, and such commission may be supported either by proof of such last-mentioned, or of any other act of bankruptcy; and every person so receiving such money, gift, delivery, satisfaction, or security as aforesaid, shall forfeit (z) his whole debt, and also repay or deliver up such money, gift, satisfaction, or security as aforesaid, or the full value thereof, to such person or persons as the commissioners acting under such original commission, or any new commission, shall appoint for the benefit of the creditors of such bankrupt."

There is another *act of bankruptcy* contained in the insolvent act, stat. 7 G. 4. c. 57. That act provides, that filing a petition to take the benefit thereof, shall be an *act of bankruptcy*, from the filing the petition, of which an office copy is evidence; but is not to be an act of bankruptcy, unless the party be declared bankrupt before the time advertized in the Gazette, for hearing his petition, or within two calendar

(z) See Exp. Marshall, 2 Gl. & J. 53. 265. Exp. Dimmock, ib. 261.

months from the filing of it, within which time it will have the effect of avoiding the assignment under the insolvent act. The filing of the petition is not complete till it has reached its final destination in the proper office. (a)

There are some special provisions respecting the mode in which a trading member of parliament may become bankrupt in 6 G. 4. c. 16. ss. 9, 10, and 11. viz.

Sect. 9. " And be it enacted, That if any such trader having privilege of Parliament shall commit any of the aforesaid acts of bankruptcy, a commission of bankrupt may issue against him, and the commissioners and all other persons acting under such commission, may proceed thereon in like manner as against other bankrupts, but such person shall not be subject to be arrested or imprisoned during the time of such privilege, except in cases hereby made felony.

Sect. 10. " And be it enacted, That if any creditor or creditors of any such trader, having privilege of Parliament, to such amount as is hereinafter declared requisite to support a commission, shall file an affidavit or affidavits in any court of record at Westminster, that such-debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall sue out of the same court a summons, or an original bill and summons, against such trader, and serve him with a copy of such summons, if such trader shall not, within one calendar month after personal service of such summons, pay, secure, or compound for such debt or debts to the satisfaction of such creditor or creditors, or enter into a bond in such sum, and with two sufficient sureties, as any of the judges of the court out of which such summons shall issue shall approve of, to pay such sum as shall be recovered in such action or actions, together with such costs as shall be given in the same, and within one calendar month next after personal service of such summons cause an appearance or appearances, to be entered to such action or actions, in the proper court or courts in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons, and any creditor or creditors of such trader to such amount as aforesaid, may sue out a commission against him, and proceed thereon in like manner as against other bankrupts.

(a) *Garlick v. Sangster*, 9 Bingh. 46.

Sect. 11. " And be it enacted, That if any decree or order shall have been pronounced in any cause depending in any court of equity, or any order made in any matter of bankruptcy or lunacy, against any such trader, having privilege of Parliament, ordering such trader to pay any sum of money, and such trader shall disobey, the same having been duly served upon him, the person or persons entitled to receive such sum under such decree or order, or interested in enforcing the payment thereof pursuant to such decree or order, may apply to the court by which the same shall have been pronounced to fix a peremptory day for the payment of such money, which shall accordingly be fixed by an order for that purpose; and if such trader, being personally served with such last-mentioned order eight days before the day therein appointed for payment of such money, shall neglect to pay the same, he shall be deemed to have committed an act of bankruptcy from the time of the service thereof, and any such creditor or creditors as aforesaid, may sue out a commission against him, and proceed thereon in like manner as against other bankrupts."

The form of the *summons* spoken of in the above enactment, is given in the schedule to stat. 2 W. 4. cap. 39. commonly called the *uniformity of process act*.

We have now finished the consideration of the several acts designated by the legislature as acts of bankruptcy; it remains to make a few observation upon the nature of such acts in general. In consequence of a principle which long obtained, though now almost exploded, that bankruptcy was to be looked on as a *crime*, and acts of bankruptcy as criminal, it has been frequently laid down that such acts are not to be multiplied by any construction, or implication, and that nothing shall be deemed an *act of bankruptcy*, except what is expressly declared to be so by statute. (b) For the same reason, it was decided that an *act of bankruptcy* could not be committed abroad; (c) a doctrine, the effect of which has, as we

(b) 1 Bl. 442, 3 Camp. 350. 15 Ves. 462. 17 Ves. 198. 19 Ves. 543. Lord

Coke speaks of "the wickedness of bankrupts." 4 Inst. 277.

(c) Com. Dig. Bankrupt, C. 4.

have seen in perusing the different enactments above cited, been, in several cases, expressly obviated by the legislature.

An act of bankruptcy may be committed after the bankrupt has quitted trade. (*d*) When once committed, it cannot be purged. i. e. its effect cannot be obviated by any subsequent conduct on the bankrupt's part. (*e*) But an *act of bankruptcy, concerted* between the trader and petitioning creditor, cannot be set up as such against any person who is not privy or consenting to it; (*f*) though persons, who are so, are estopped from saying any thing against it. (*g*) And even persons who are not privy to it, though they need not treat it as valid, may do so, and may sue out a fiat on it, at least, in cases, where the question, whether it be or be not an act of bankruptcy, does not depend on the intention with which it was done. (*h*)

Though an act of bankruptcy will not be effectual, if concerted; a fiat, though concerted, will, provided it be founded on a sufficient act of bankruptcy; (*i*) for by stat. 1 & 2 W. 4. c. 56. s. 42,

“No commission of bankrupt shall be superseded, nor any fiat annulled, nor any adjudication reversed, by reason only that the commission, fiat, or adjudication has been concerted by and between the petitioning creditor, his solicitor or agent, or any of them, and the bankrupt, his solicitor or agent, or any of them.”

(*d*) Baillie v. Grant, 9 Bingham 121. Exp. Bamford, 15 Ves. 449.

(*e*) 2 T. R. 62. Mucklow v. May, 2 Taunt. 479.

(*f*) Marshall v. Barkworth, 4 B. & Ad. 508. Bamfield v. Baron, 2 T. R. 594. Roberts v. Teasdale, Peake, 27. Prosser v. Smith, Holt, 442. Exp. Gouthwaite, 1 Rose, 87. stat. 6 G. 4. c. 16. s. 7. which makes a declaration of

insolvency, filed at the bankrupt's office an act of bankruptcy, allows it to be concerted.

(*g*) Bramley v. Mundee, B. N. P. 39. See Stewart v. Richman, 1 Esp. 108. Exp. Bourne, 16 Ves. 145.

(*h*) Cawley v. Hopkins, Co. B. L. 92.

(*i*) See Marshall v. Barkworth, 4 B. & Adol. 508.

SECTION III.—*The Proceedings on a Bankruptcy.*

Having considered who may be a bankrupt, and how he may become so, we arrive at the third division of our subject, viz. The proceedings consequent upon a bankruptcy. And, as in order to found any proceedings whatever upon an act of bankruptcy, it is absolutely necessary that there should be some creditor, to whom a debt is due from the trader, of such amount as the legislature has considered sufficient to entitle him to petition for the institution of those proceedings, the *petitioning creditor* and his *debt*, will be the first objects of our consideration.

Petitioning Creditor.

By 1 G. 4. c. 16. s. 15. it is enacted,

“ That no commission shall be issued unless the single debt of such creditor, or of two or more persons being partners, petitioning for the same, shall amount to one hundred pounds or upwards, or unless the debt of two creditors, so petitioning, shall amount to one hundred and fifty pounds or upwards; or unless the debt of three or more creditors so petitioning, shall amount to two hundred pounds or upwards; and that every person who has given credit to any trader, upon valuable consideration for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may so petition or join in petitioning as aforesaid, whether he shall have any security in writing or otherwise, for such sum or not.”

A creditor to the amount of 100*l.* on notes, which he had bought in at ten shillings in the pound, (*j*) and one to the amount of 112*l.*, who, after notice of an act of bankruptcy, received a void payment of 50*l.*, (*k*) have been considered to

(*j*) Exp. Lee, 1 P. Wms. 782.

Exp. Miller, Buck. 283. S. P. See Doe

(*k*) Mann v. Shepherd, 6 T. R. 79.

v. Anderson, 1 Stark. 262. 5 M. & S. 1.

possess sufficient debts. A bill of exchange is a debt, from the date of it, against the drawer; therefore, a bill for 100*l.*, issued before the bankruptcy, is sufficient, though it fall due afterwards; (*l*) but interest accruing after the act of bankruptcy, could not, before 6 G. 4. c. 16. s. 57. be added to the principal, unless specially made payable on the face of the bill; (*m*) quære, however, whether that enactment has not altered the rule. (*n*)

The debt must be due both in law and equity; (*o*) due to the petitioning creditor alone, (*p*) unless he be a co-assignee (*q*) or copartner; it may be on account, if the creditor swear to a sufficient balance; (*r*) or a sum awarded, notwithstanding a bill filed to set aside the award; (*s*) or an attorney's bill though not signed or delivered; (*t*) or the debt of a surety. (*u*) But not a mere security for a contingent demand; (*w*) nor costs recoverable only by attachment; (*x*) nor damages for a tort before judgment; (*y*) nor a debt for which the debtor is in execution; (*z*) nor a cross-acceptance, unless the creditor have paid his own; (*a*) nor can the husband petition alone on a debt due to his wife, *dum sola*, (*b*) unless it be a bill or

(*l*) Brett v. Lovett, 13 East. 213.
Exp. Douthat, 4 B. & A. 67.

(*m*) Exp. Greenway, Buck. 412.
Re Burgess, 8 Taunt. 660. Cameron v.
Smith, 2 B. & A. 305.

(*n*) See Bayley on Bills, 5th ed. 416.

(*o*) Exp. Hillyard, 1 Atk. 147. Exp.
Lee, 1 P. Wms. 782. Medicott's case,
Str. 899.

(*p*) Brickland v. Newsome, 1 Camp.
474. 1 Taunt. 479.

(*q*) Exp. Blakey, 1 G. & J. 197.

(*r*) Flower v. Herbert, 2 Ves. 327.
Vide tamen Exp. Bowes, 4 Ves. 168.

(*s*) Exp. Lingood, 1 Atk. 240.
Marson v. Barber, Gow. 17.

(*t*) Exp. Sutton, 17 Ves. 163. Exp.
Steele, 16 Ves. 166. Exp. Howell, 1
Rose, 312. See exp. Prideaux, 1 G. &
J. 28.

(*u*) Heylor v. Hall, Palm. 325.
Denham's case, Stone, 183.

(*w*) Exp. Page, 1 G. & J. 100.

(*x*) Exp. Stevenson, 1 Mont. & Mac.
262.

(*y*) Exp. Charles, 16 Ves. 256.

(*z*) Burnaby's case, Str. 653. Cohen
v. Cunningham, 8 T. R. 123.

(*a*) Sarratt v. Austin, 4 Taunt. 200.

(*b*) Rumsey v. George, 1 M & S.
176.

note. (c) Of course, the debt must not be bad for illegality. (d) It was once held that a debt barred by the statute of limitations is sufficient, (e) unless, perhaps where the objection is taken by the bankrupt himself, yet, the *proof* of such a debt is disallowed. (f) A debt will be sufficient, though the debtor have been insolvent, and it was included in his schedule; (g) or though a security of a higher nature have been taken for it since the bankruptcy. (h) A debt due to an infant will not be sufficient. (i)

Time of debt.—The debt must have been contracted while the party was a trader, or if before, must have been subsisting while he was a trader. (k) A debt contracted before, and subsisting during the trading, is sufficient to support a commission founded on an act of bankruptcy, subsequent to the trading. (l) It must also have been due from the debtor before an act of bankruptcy. (m) As a bill of exchange is a debt from the date of it, as against the drawer, it is sufficient to constitute a petitioning creditor's debt, though not indorsed to the creditor till after an act of bankruptcy; (n) but if the creditor be indorsee, it must appear that it was indorsed to him before fiat issued. (o) Such a bill has been

(c) Exp. Barber, 1 G. & J. 1. See *M'Neillage v. Holloway*, 1 B. & A. 218.

(d) *M'Connell v. Hector*, 3 B. & P. 113. Exp. Randleson, 1 M. & M. 86.

(e) *Swayne v. Wallenger*, 2 Str. 746. *Quantock v. England*, 5 Burr, 2628. *Fowler v. Browne*, Co. B. L. 18. *Mavor v. Pyne*, 3 Bingh. 285.

(f) Exp. Dewdney, Exp. Seaman, 15 Ves. 498. Exp. Roffey, 19 Ves. 468. 2 Rose, 245. See *Gregory v. Hurril*, 5 B. & C. 341. *quare*, therefore, whether it would now be held a good petitioning creditor's debt.

(g) *Jellis v. Mountford*, 4 B. & A. 256.

See exp. Shuttleworth, 2 G. & J. 68.

(h) *Ambrose v. Clendon*, 2 Str. 1042.

(i) Exp. Barrow, 3 Ves. 554. Exp. Morton, Buck. 42.

(k) *Meggott v. Mills*, 1 Ld. Raym. 237. *Heanny v. Birch*, 3 Camp. 234. *Butcher v. Easto*, Dougl. 295.

(l) *Baillie v. Grant*, 9 Bingh. 121.

(m) Exp. Wainman, Co. B. L. 31. *Hill v. Harris*, 1 M. & M. 448. *Mayer v. Payne*, 2 C. & P. 91.

(n) *Macarty v. Barrow*, 2 Str. 949. *Glaister v. Hewett*, 7 T. R. 498. Anon. 2 Wils. 135.

(o) *Rose v. Rowcroft*, 4 Camp. 245.

held sufficient to support a fiat against the drawer, though paid by the acceptor after fiat issued : (p) in that case it had neither arrived at maturity nor been presented ; where it has arrived at maturity, it is, for obvious reasons, necessary to prove presentment and notice of dishonour. (q)

By 6 G. 4. c. 16. s. 18, it is enacted,

“That if after adjudication, the debt or debts of the petitioning creditor or creditors, or any of them, be found insufficient to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor or creditors, having proved any debt or debts, sufficient to support a commission, provided such debt or debts has or have been incurred not anterior to the debt or debts of the petitioning creditor or creditors, to order the said commission to be proceeded in, and it shall by such order be deemed valid.” (r)

The nature of *adjudication*, will be presently explained.

There were formerly cases in which a commission might have been impeached, by shewing an act of bankruptcy previous to the petitioning creditor's debt, and a debt which would have entitled its owner to found a petition on that act of bankruptcy ; this is remedied by stat. 6 G. 4. c. 16. s. 19. which enacts,

“That no commission shall be deemed invalid by reason of any act or acts of bankruptcy prior to the debt or debts of the petitioning creditor or creditors, or any of them, provided there be a sufficient act of bankruptcy subsequent to such debt or debts.”

The petitioning creditor is bound to support the validity of the bankruptcy, and may be compelled to furnish the assignees with all necessary information and assistance towards that object. (s) By 6 G. 4. c. 16. s. 14. it is enacted,

“That the petitioning creditor or creditors, shall, at his or their own costs, sue forth and prosecute the commission until the choice

(p) Exp. Douthat, 4 B. & A. 67.

(q) Cooper v. Machin, 1 Bingham. 426.

(r) See Musket v. Drummond, 10 B. & C. 161.

(s) Exp. Jackson, 2 Rose, 188.

Exp. Glossop, ib. 386. Exp. Graves,

1 G. & J. 86. Exp. Paul, 1 M. & M.

185. See Reed v. James, 1 Star. 132.

Exp. Glover, 2 G. & J. 60. Harmer v.

Davis, 7 Taunt. 577.

of assignees; and the commissioners shall, at the meeting for such choice, ascertain such costs, and by writing under their hands, direct the assignees (who are hereby thereto required) to reimburse such petitioning creditor or creditors such costs out of the first money that shall be got in under the commission; and all bills of fees or disbursements of any solicitor or attorney, employed under any commission for business done after the choice of assignees, shall be settled by the commissioner, except that so much of such bills as contain any charge respecting any action at law, or suit in equity, shall be settled by the proper officer of the court in which such business shall have been transacted, and the same, so settled, shall be paid by the assignees to such solicitor or attorney: provided that any creditor, who shall have proved to the amount of twenty pounds or upwards, if he be dissatisfied with such settlement by the commissioners, may have any such costs and bills settled by a Master in Chancery, who shall receive for such settlement, and the certificate thereof twenty shillings, and no more."

Where the debt is that of a firm, the provisions of 6 G. 4. c. 16. s. 16. apply, viz.

"That any creditor or creditors, whose debt or debts is or are sufficient to entitle him or them to petition for a commission against all the partners of any firm, may petition for a commission against one or more partners of such firm, and every commission issued upon such petition, shall be valid, although it does not include all the partners of the firm; and in every commission against two or more persons, it shall be lawful for the Lord Chancellor to supersede such commission as to one or more of such persons, and the validity of such commission shall not be thereby affected as to any person as to whom such commission is not ordered to be superseded, nor shall any such person's certificate be thereby affected."

This provision enables the joint-creditor of a firm to sue out a *joint fiat* against some of its members who have become bankrupt, omitting the rest. He always had it in his power to sue out a separate fiat against any one of them, for which purpose the joint demand was a sufficient petitioning creditor's debt. (t)

(t) *Crisp v. Perritt*, Willes, 467. *Smith v. Oriel*, 1 East. 368.

Striking Docket.

Having now seen who may be a petitioning creditor, let us consider how he must proceed. His first step must be to ascertain by a search at the Bankrupt Office, that no docket has been struck against the trader. His next, to swear before a Master in Chancery to the amount of his debt, and his belief that the trader has become bankrupt; and execute a bond conditioned for proving his debt, and the act of bankruptcy, and for proceeding on the fiat. (*u*) This bond and affidavit, are in pursuance of stat. 6 G. 4. c. 16. s. 16. which enacts,

“That the petitioning creditor shall, before any commission be granted, make an affidavit in writing before a Master ordinary or extraordinary in Chancery (which shall be filed with the proper officer,) of the truth of such his or their respective debt or debts; and shall likewise give bond to the Lord Chancellor, in the penalty of two hundred pounds, to be conditioned for proving his or their debt or debts, as well before the commissioners as upon any trial at law, in case the due issuing forth of the commission be contested, and also for proving the party to have committed an act of bankruptcy at the time of taking out such commission, and to proceed on such commission; but if such debt or debts shall not be really due, or if after such commission taken out it be not proved that the party had committed an act of bankruptcy at the time of the issuing of the commission, and it shall also appear that such commission was taken out fraudulently or maliciously, the Lord Chancellor shall and may, upon petition of the party or parties against whom the commission was so taken out, examine into the same, and order satisfaction to be made to him or them, for the damages by him or them sustained, and, for the better recovery thereof, may assign such bond or bonds to the party or parties so petitioning, who may sue for the same in his and their name or names.”

Although the petitioning creditor must, at this period, swear to his belief that an act of bankruptcy has been com-

(*u*) For a minute account of these of the bond and affidavit, see Eden, proceedings, and of the form and contents p. 51, et seq.

mitted; yet it will be sufficient to support the fiat, if one be committed before it issues. (v) When the affidavit and bond are delivered at the Bankrupt Office, an entry is made in a book called the docket book, and the petitioning creditor is then said to have "*struck a docket*" against the trader.

We have seen that the above action gives the Lord Chancellor certain powers in case of the malicious prosecution of a bankruptcy. These may be exercised either by assigning the bond in the first instance, or directing an inquiry or issue to ascertain the damage sustained. (w) The assignment of the bond is conclusive evidence of malice. (x) The injured party may, if he please, bring an action on the case for maliciously suing out a fiat, (y) in which he must aver and prove that the fiat was superseded before the commencement of the action. (z)

Fiat.

We now come to the *fiat*, which is substituted for a *commission* by the bankrupt court act. This, when the above preliminaries have been complied with, is on the creditor's formal petition, granted to him by the Court of Chancery, exercising the power confided to it by stat. 6 G. 4. c. 16. s. 12. which enacts,

"That the Lord Chancellor shall have power, upon petition made to him in writing, against any trader having committed any act of bankruptcy, by any creditor or creditors of such trader, by commission under the great seal, to appoint such persons as to him shall seem fit, who shall by virtue of this act, and of such commission, have full power and authority to take such order and direction with the body of such bankrupt as herein-after mentioned, as also with

(v) Exp. Dufresne, 1 V. & B. 51.
Simpson v. Sikes, 6 M. & S. 312.

(w) Smith v. Broomhead, 7 T. R. 304.
Smithey v. Edmondson, 3 East. 33. Exp.
Rimene, 16 Ves. 600.

(x) Exp. Gayter, 1 Atk. 144. See
cases last cited.

(y) Brown v. Chapman, 4 Burr.
1418. See Cotton v. James, 1 B. & Ad.
128.

(z) Whitworth v. Hall, 2 B. & Ad. 695.

all his lands, tenements, and hereditaments, both within this realm and abroad, as well copy or customaryhold, as freehold, which he shall have in his own right before he became bankrupt, as also with all such interest in any such lands, tenements, and hereditaments as such bankrupt may lawfully depart withall, and with all his money, fees, offices, annuities, goods, chattels, wares, merchandize, and debts, wheresoever they may be found or known, and to make sale thereof in manner herein-after mentioned, or otherwise order the same for satisfaction and payment of the creditors of the said bankrupt."

coupled with statute 1 & 2 W. 4. c. 56. s. 12. which enacts,

"That in every case wherein the Lord Chancellor, by virtue of any former act, hath power to issue a commission of bankrupt under the great seal, it shall and may be lawful for him, and also for the Master of the Rolls, the Vice Chancellor, and each of the Masters of the Court of Chancery, acting under any appointment by the Lord Chancellor, to be given for that purpose, on petition made to the Lord Chancellor against any trader having committed any act of bankruptcy, by any creditor of such trader, and upon his filing such affidavit and giving such bond as is by law required, to issue his fiat under his hand in lieu of such commission, thereby authorizing such creditor to prosecute his said complaint in the court of bankruptcy, or to prosecute the same elsewhere, before such discreet and proper persons as the Lord Chancellor, or as the Master of the Rolls, Vice Chancellor, or one of the Masters of the Court of Chancery, acting as aforesaid, by such fiat, may think fit to nominate and appoint: and that the persons so appointed, shall thereby have the like power and authority, to all intents and purposes, as if they were assigned and appointed special commissioners by virtue of a commission under the great seal."

Sect. 13. "And be it enacted, That every such fiat, prosecuted in the said Court of Bankruptcy, shall be filed and entered of record in the said court, and shall thenceforth be a record of the said court, and it shall thereupon be lawful for any one or more of the commissioners thereof to proceed thereon in all respects as commissioners acting in the execution of a commission of bankrupt, save and except as such proceeding may be altered by virtue of this act."

Sect. 14. " And be it enacted, That the judges who go the several circuits in England and Wales, may be directed by the lord chancellor from time to time to return to him the names of such number as he shall think fit to require of barristers, solicitors, and attornies, practising in the counties to the said circuits belonging, and upon such persons being returned, and approved by the Lord Chancellor the fiat or fiats aforesaid not directed to the Court of Bankruptcy, shall be directed to some one or more of such persons in rotation, to act as commissioners of bankrupt, according to the districts or places for which such person shall be so returned, and to no other person than such as shall be included in such return: provided always, that it shall be lawful for the Lord Chancellor at any time to remove any person from the lists to be so returned, for such cause as to him shall seem fit."

This section is to provide for the appointment of country commissioners.

Sect. 16. " And be it enacted, That all the laws and statutes, rules and orders, now in force relating to bankrupts, or to commissioners of bankrupt, or to proceedings under such commissions, or to the subject matters of such proceedings, or to the persons concerned therein or in any way affected thereby, shall in like manner extend and be construed to extend in every respect, as far as the same may be applicable, to this act, and to fiats issued in pursuance thereof, and to all proceedings under the same, and to all the subject matters of such proceedings, and to all persons concerned therein or in any way affected thereby, to all intents and purposes whatsoever, as if every such fiat were a commission of bankrupt under the great seal of the united kingdom of Great Britain and Ireland, save and except as may be otherwise directed by this act."

The reader may, therefore, mentally substitute the word *fiat*, for *commission*, in his perusal of any statute previous to this enactment.

Thus we see that the original jurisdiction in matters of bankruptcy resides in the Court of Chancery, as it, indeed, has done ever since the 13th year of Queen Elizabeth. The jurisdiction resided solely in that court, till stat. 1 & 2 W. 4.

c. 56. which gives a portion of it to the *Court of Bankruptcy*. However, the *original* jurisdiction, i. e. the power of issuing a fiat is still solely in the Court of Chancery, and this power is not discretionary, but must be exercised, *ex debito justitiæ* on the application of the petitioning creditor; (a) but though the subject has a *right* to the exercise of the power, yet the court may limit and mould that right, as the interests of justice require. Thus, it will not allow a creditor to proceed on a stale act of bankruptcy, for though the statutes do not distinguish between that and a recent one, yet the court considers it an abuse, to permit the trader to go on dealing with the world in the meantime.

We have observed, that previously to stat. 1 & 2 W. 4. c. 56. the sole jurisdiction in bankruptcy was vested in the chancellor. Excepting where that act has interfered, such jurisdiction still continues to reside in him; the statutes which gave it to him were all framed with a view to the authority, with which he is entrusted in the exercise of his ordinary jurisdiction, and where those statutes are silent, as to the mode of compelling obedience to the orders that may be necessary for carrying their provisions into effect, the chancellor has power to use, in bankruptcy, the authority which he uses in chancery for that purpose. (b)

The *fiat* must be *subsequent* to the act of bankruptcy, though it may be on the same day. (c) Whether it shall be prosecuted in town or in the country, lies in the discretion of the petitioning creditor, or, if there be a competition between town and country, of the majority of creditors. (d) It may be separate against a single trader, or joint against several traders in partnership; but a joint bankruptcy, void as to one partner, is also (at least so far as the provisions of 6 G. 4.

(a) Exp. Lancaster, 1 Rose, 220.

(c) Exp. Dobree, 8 Ves. 82. Exp.

(b) 14 Ves. 449, 1 Rose, 202.

Dufresne, 1 V. & B. 54.

Dicas v. Lord Brougham, 6 Carr. & P. 263.

(d) Exp. Bowdler, 1 Rose, 48. See in re Child, Buck. 425. Exp. Fellows, 2 Madd. 141.

c. 16. s. 16. do not interfere) void as to the other. (e) There is a peculiar provision for the case of fiats, issued at intervals against partners in the same firm, by stat. 6 G. 4. c. 16. s. 17. which enacts,

“That if after a commission issued against two or more members of a firm, any other commission or commissions shall be issued against any other member or members of such firm, such other commission or commissions shall be directed to the commissioners to whom the first commission was directed, and immediately after the adjudication under such other commission or commissions, the commissioners shall convey and assign all the estate real and personal of such bankrupt or bankrupts, to the assignees chosen in the first commission; and after such conveyance all separate proceedings under such other commission or commissions shall be stayed, and such commission or commissions shall, without affecting the validity of the first commission, be annexed to and form part of the same; provided that the Lord Chancellor may direct that such other commission or commissions be issued to any other commissioners, or that such other commission or commissions shall proceed either separately or in conjunction with the first commission.”

There may also be an *auxiliary fiat*, or a *renewed fiat*; the former by virtue of 6 G. 4. c. 16. s. 20. which enacts,

“That it shall be lawful for the Lord Chancellor to direct an auxiliary commission to issue for proof of debts under twenty pounds, and for the examination of witnesses on oath, or for either of such purposes; and the commissioners in every such commission issued for the examination of witnesses, shall possess the same powers to compel the attendance of, and to examine witnesses, and to enforce obedience to such examination, and the production of books, deeds, papers, writings, and other documents, as are possessed by the commissioners in any original commission: provided always, that all such examinations of witnesses, under such commissions, shall be taken down in writing, and shall be annexed to and form part of the original commission.”

(e) *Beaseley v. Beaseley*, 1 Atk. 97. *Bygrave*, 2 G. & J. 391. In re *Colman*, *Hogg v. Bridges*, 2 Moore, 122. But see *Mon. & Mac.* 16. *Exp. Wray*, *Mon. & Mac.* 195. 6 G. 4. c. 16. s. 16. ante p. 369; and see *Exp. Burton*, 2 G. & J. 344. *Exp.*

The latter by 6 G. 4. c. 16. s. 26. which enacts,

“That no commission shall abate by reason of a demise of the Crown, and (if by reason of the death of commissioners, or for any other cause, it become necessary) any commission may be renewed, but only half the fees usually paid upon obtaining commissions shall be paid for the same; and if any bankrupt shall die after adjudication, the commissioners may proceed in the commission as they might have done if he were living.”

As the chancellor may issue, so he may annul a fiat; stat. 1 & 2 W. 4. c. 56. s. 19. enacting,

“That it shall be lawful for the Lord Chancellor, upon the reversal of any adjudication of bankruptcy, or for such other cause as he shall think fit, to order that any fiat issued by virtue of this act, shall be rescinded or annulled; and such order shall have all the force and effect of a writ of supersedeas of a commission according to the existing laws and practice in bankruptcy.”

A second fiat is a nullity, if issued before the bankrupt has obtained his certificate under the first, (*f*) and after the appointment of assignees. (*g*)

Having explained the nature of the fiat, we will proceed to consider the character of the persons to whom it is directed, these are either a commissioner of the Court of Bankruptcy or country commissioners.

1. *Of the Court of Bankruptcy.*—The Court of Bankruptcy derives its jurisdiction from stat. 1 & 2 W. 4. c. 56. which enacts,

“That it shall and may be lawful for His Majesty, his heirs and successors, by charter or letters patent under the great seal of the United Kingdom of Great Britain and Ireland, to erect and establish a Court of Judicature, which shall be called the Court of Bankruptcy, and by commission under the great seal to appoint one person, being

(*f*) Fowler v. Carter, 10 B. & C. 427. Nelson v. Cherrill, 7 Bingh. 663. Phillips v. Hopwood, 1 B. & Ad. 620.

(*g*) Warner v. Barber, 2 Moore, 71. 1 Taunt. 176.

a serjeant or a barrister at law, of not less than ten years standing, to be the Chief Judge of the said court, and three persons, being serjeants or barristers at law of not less than ten years standing at the bar, or of five years standing at the bar, having previously practised five years as a special pleader below the bar, to be other judges of the said court, and six persons, being barristers at law of not less than seven years standing at the bar, or of four years standing at the bar, having previously practised as a special pleader for three years below the bar, to be called commissioners of the said court, and from time to time to supply any vacancy in the number of the said judges and commissioners; and the same court shall be and constitute a court of law and equity, and shall, together with every judge and commissioner thereof, have, use, and exercise all the rights, incidents, and privileges of a court of record, or judge of a court of record, and all other rights, incidents, and privileges, as fully to all intents and purposes as the same are used, exercised, and enjoyed by any of His Majesty's courts of law, or judges at Westminster."

The 8th section contains the oath of office. The 11th enables the judges, with the consent of the Lord Chancellor, to make rules for regulating the proceedings of the court; the 50th provides for their salaries; the 60th makes every judge and officer ineligible to sit in Parliament; the 51st restricts them from practising as counsel or solicitors; the 58th imposes penalties on taking fees. The 9th provides for the appointment of two registrars, and any number, not exceeding eight, of deputy registrars. The 10th enacts,

"That all attorneys and solicitors of any of the superior courts of law or equity at Westminster, may be admitted and have their names enrolled in the said court of bankruptcy, without any fee or charge other than such as shall be allowed by this act, or any rule or regulation to be made in pursuance thereof, and may appear and plead in any proceedings in the said court, without being required to employ counsel, (except in proceedings before the court of review, and upon the trial of issues by jury;) and in case any person, not being an attorney or solicitor duly admitted as aforesaid, shall practise in the said court of bankruptcy as an attorney or solicitor, he shall be deemed guilty of a contempt of the said court, and be liable to all the

penalties incident thereto, on complaint thereof made to the Court of Review; and that all the laws and statutes now in force concerning attorneys and solicitors shall extend to attorneys and solicitors practising in the said Court of Bankruptcy."

The 38th section points out the mode in which evidence may be taken before this court, and is as follows:

"And be it enacted, That the said judges and commissioners of the said Court of Bankruptcy shall, in all matters within their respective jurisdictions have power to take the whole or any part of the evidence either *viva voce* on oath, or upon affidavits to be sworn before one of the said judges or commissioners, or a Master, ordinary or extraordinary, in Chancery, as the said court may, in any case direct, or as the Lord Chancellor may, from time to time prescribe, by any general rule to be made by virtue of this act."

By stat. 3 & 4 W. 4. c. 47. his majesty is empowered to authorise any one or more judge or judges of the Court of Bankruptcy, to exercise the same powers as the Bankrupt Court act gives to three, and to direct the time of the sittings of the judges and commissioners. The act also empowers the judges to direct costs to be taxed by one of their own registrars, or deputy registrar, and gives his Majesty power to employ the judges of the Court of Bankruptcy, other than the Chief, to act in the Insolvent Debtor's Court.

The different component parts of the Court of Bankruptcy are created by the sections just enumerated. Their respective functions are prescribed by other sections of the same statute. These concern either *the ordinary administration of the bankrupt's estate*, which is vested in the commissioners, or *the general controlling authority given by the bankrupt law*, and exercised either by original interposition in the affairs of the bankrupt, or on appeals from the administrative tribunal. This is now vested in the *Court of Review*, subject to an appeal to the Lord Chancellor, and in certain cases to the House of Lords.

Court of Review.—With respect to the *Court of Review*, the principal enactments are as follows:

Sect. 2. " And be it enacted, That the said judges or any three of them shall and may form a Court of Review, which shall always sit in public, save and except as may be otherwise directed by this act, or by the rules and regulations to be made in pursuance hereof, and shall have superintendence and controul in all matters of bankruptcy, and shall also have power, jurisdiction, and authority to hear and determine, order, and allow all such matters in bankruptcy as now usually are, or lawfully may be brought, by petition or otherwise, before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy or elsewhere, except as is herein otherwise provided, and also to investigate, examine, hear, and determine, all such other matters within the jurisdiction of the said Court of Bankruptcy, as are by this act, or may be by the said rules and regulations assigned and referred to the said Court of Review."

Sect. 3. " And be it enacted, That all such matters to be heard and determined in the said Court of Review, shall be brought on by way of petition, motion, or special case, according to the rules and regulations to be established as hereinafter provided, subject to an appeal to the Lord Chancellor on matters of law and equity, or on the refusal or admission of evidence only; and in all cases of appeal to the Lord Chancellor by virtue of this act such appeal shall be on a special case, and in no other mode whatsoever, except the Lord Chancellor shall in any case otherwise direct; which special case shall be approved and certified by one of the judges of the said court of review in matters arising in the said court, and by the judge trying the issue in matters arising out of the trial of issues; and the determination of such judge on the settlement of such case shall be final and conclusive: provided always, that all appeals to the Lord Chancellor by virtue of this act, shall be heard by the Lord Chancellor only, and not by any other judge of the High Court of Chancery."

Sect. 4. " And be it enacted, that it shall be lawful for the said Court of Review to direct any issue of fact arising therein, to be tried by a jury before one of the judges thereof, or before a judge of assize, and to issue process to compel the attendance of jurors and witnesses, and to enforce the orders and decrees of the said Court of Review, and to that end to exercise all the powers vested for such purposes in any of his Majesty's Courts of Record at Westminster."

Sect. 5. " And be it enacted, That all costs of suit between party

and party in the said Court of Review, shall be in the discretion of the court, and shall be taxed by one of the masters of the High Court of Chancery." (h)

Sect. 33. " And be it enacted, That after any issue by this act authorized shall be tried, a new trial may be moved in the Court of Review, which new trial shall be granted or refused according to the rules of the common law, and the practice of the Courts of Westminster, in granting or refusing new trials."

Sect. 37. " And be it enacted, That in case the Lord Chancellor shall deem any matter of law or equity, brought before him by way of appeal from the Court of Review, to be of sufficient difficulty or importance to require the decision of the House of Lords, or in case both parties in any proceeding before the Court of Review shall desire that any such matter may be determined in the first instance by the House of Lords, and not by the Lord Chancellor, then and in such case the Lord Chancellor or the Court of Review may direct the whole facts whereupon such question of law or equity shall arise to be stated in the form of a petition of appeal to the House of Lords, and the party appealing may carry such appeal to the House of Lords, in like manner as other appeals are preferred to that house; provided always, that the cases to be lodged by the parties in the House of Lords shall be confined in matter of fact, in cases of appeal from the Lord Chancellor, to setting forth the special case brought up to the Lord Chancellor from the Court of Review, and in cases of appeal from the said Court of Review, to setting forth a special case, to be approved and certified in manner herein-before provided touching appeals to the Lord Chancellor, and to such arguments on the point of law as the parties may be advised to state."

Commissioners of Court of Bankruptcy.—We now proceed to the statutory regulations respecting commissioners.

Sect. 6. " And be it enacted, " That the said six commissioners may be formed into two subdivision courts, consisting of three commissioners for each court, for hearing and determining the matters and things and making the examinations herein-after referred to;

(x) The Court of Review may now, to be taxed by one of its own registrars
by stat. 3 & 4 W. 4. c. 47. direct them or deputy registrars.

and all references or adjournments by a single commissioner to a subdivision court, by virtue of this act, shall be to the subdivision court to which he belongs, unless the said commissioner, in case of the sickness of some one or more of the commissioners of such subdivision court, or other sufficient cause, shall think fit otherwise to direct; and the said subdivision courts may sit either in public or private, as they shall see fit, unless where it shall be otherwise provided by this act, or by the rules to be made as herein-after mentioned."

Sect. 7. "And be it enacted, That in every bankruptcy, prosecuted in the said Court of Bankruptcy, it shall and may be lawful for any one or more of the said six commissioners to have, perform, and execute all the powers, duties, and authorities, by any act or acts of parliament now in force vested in commissioners of bankrupt, in all respects as if they or any one or more of them were in every instance specially authorized and appointed for the purpose by a separate commission under the great seal of the United Kingdom of Great Britain and Ireland; provided always, that no single commissioner shall have power to commit any bankrupt or other person examined before him, otherwise than to the care and custody of a messenger or other officer of the said court, to be by him detained in his custody, and brought up before a subdivision court or the Court of Review, within three days after such commitment, for which purpose one of such courts shall be forthwith assembled, and to which court such examination shall be adjourned."

Sect. 30. "And be it enacted, That any one of the said six commissioners, if he think fit, may adjourn the examination of any bankrupt or other person to be taken either before a subdivision court or the Court of Review, and may likewise adjourn the examination of a proof of debt to be heard before a subdivision court; which said court shall proceed with such last-mentioned examination, and finally, and without any appeal, except upon matter of law or equity, or of the refusal or the admission of evidence, shall determine upon such proof of debts; provided always, that in case, before the said commissioner or subdivision court, both parties, the assignees or the major part of them, and the creditor, consent to have the validity of any debt in dispute tried by a jury, an issue shall be prepared under the direction of the said commissioner or subdivision court, and sent for trial before the chief judge or one or more of the other judges; and if one party only applies for

such issue, the said commissioner or subdivision court shall decide whether or not such trial shall be had, subject to an appeal as to such decision to the Court of Review."

Sect. 31. "And be it enacted, That if such commissioner or subdivision court shall determine any point of law or matter of equity, or decide on the refusal or admission of evidence in the case of any disputed debt, such matter may be brought under review of the Court of Review by the party who thinks himself aggrieved, and the proof of the debt shall be suspended until such appeal shall be disposed of, and a sum not exceeding any expected dividend or dividends on the debt in dispute in such proof may be set apart in the hands of the said Accountant General until such decision be made; and in like manner there may be an appeal on the like matter of law or equity from the Court of Review to the Lord Chancellor."

Sect. 32. "And be it enacted, That if the Court of Review shall determine in any appeal touching any decision in matter of law upon the whole merits of any proof of debt, then the order of the said court shall finally determine the question as to the said proof, unless an appeal to the Lord Chancellor be lodged within one month from such determination; and in case of such an appeal, the determination of the Lord Chancellor thereupon, shall in like manner be final touching such proof; but if the appeal, either to the Court of Review or the Lord Chancellor, shall be allowed in relation to the admission or refusal of evidence, then, and in that case, the proof of the debt shall be again heard by the commissioner or subdivision court, and the said evidence shall be then admitted or rejected accordingly."

By section 21; all powers given to the commissioners may be executed by the judges, and any reference or adjournment made by such judge, shall be to the *Court of Review* instead of a *subdivision court*.

2. *Country Commissioners*.—The oath of office to be taken by country commissioners is prescribed by 1 & 2 W. 4. c. 56. s. 15: it must be taken at the opening of every fiat, whereas that of the commissioners of the Court of Bankruptcy, needs only to be taken once. Farther, a commissioner of the Court of Bankruptcy, is a judge of record, and enjoys all the pri-

vileges and protections, with which the rules of law invest a personage of that description: the country commissioner is not a judge of record; great protection, however, is afforded him against prosecution for acts done with the intention of exercising his office, both by the ordinary rules of law in favour of inferior jurisdictions, and by the following sections of 6 G. 4. c. 16.

Sect. 41. "And be it enacted, That no writ shall be sued out against, nor copy of any process served on any commissioner, for any thing by him done as such commissioner, unless notice in writing of such intended writ or process shall have been delivered to him or left at his usual place of abode, by the attorney or agent for the party intending to sue, or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same; and such notice shall set forth the cause of action which such party has or claims to have against such commissioner, and on the back of such notice shall be indorsed the name of such attorney or agent, together with the place of his abode, who shall receive no more than twenty shillings for preparing and serving such notice."

Sect. 42. "And be it enacted, That no such plaintiff shall recover any verdict against such commissioner, in any case where the action shall be grounded on any act of the defendant as commissioner, unless it is proved upon the trial of such action, that such notice was given as aforesaid, but in default thereof such commissioner shall recover a verdict and costs, as herein-after mentioned; and no evidence shall be permitted to be given by the plaintiff on the trial of any such action of any cause of action, except such as is contained in the notice."

Sect. 43. "And be it enacted, That every such commissioner may, at any time within one calendar month after such notice, tender amends to the party complaining, or to his agent or attorney; and if the same is not accepted, may plead such tender in bar to any action brought against him, grounded on such writ or process, together with the plea of not guilty, and any other plea, with leave of the court; and if upon issue joined thereon, the jury shall find the amends so tendered to have been sufficient, they shall give a verdict for the defendant; and if the plaintiff shall become nonsuit,

or shall discontinue his action, or if judgment shall be given for such defendant upon demurrer, such commissioner shall be entitled to the like costs as he would have been entitled to in case he had pleaded the general issue only : and if upon issue so joined, the jury shall find that no amends were tendered, or that the same were not sufficient and also against the defendant on such other plea or pleas, they shall give a verdict for the plaintiff, and such damages as they shall think proper, which he shall recover together with costs of suit ; provided, that if any such commissioner shall neglect to tender any amends, or shall have tendered insufficient amends before the action brought, he may, by leave of the court where such action shall depend, at any time before issue joined, pay into court such sum of money as he shall think fit, whereupon such proceedings shall be had in court as in other actions where the defendant is allowed to pay money into court."

Sect. 44. " And be it enacted, That every action brought against any person for any thing done in pursuance of this act, shall be commenced within three calendar months next after the fact committed ; and the defendant or defendants in any such action, may plead the general issue, and give this act and the special matter in evidence at the trial, and that the same was done by authority of this act ; and if it shall appear so to have been done, or that such action was commenced after the time before limited for bringing the same, the jury shall find for the defendant or defendants ; and if there be a verdict for the defendant or defendants, or if the plaintiff or plaintiffs shall be nonsuited, or discontinue his or their action or suit after appearance thereto, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall recover double costs."

The protection afforded by this last section is, we will observe, extended to *any person doing any thing in pursuance of this act*. A thing is said to be done *in pursuance* of an act where the party who does it is acting honestly and *bonâ fide* under the powers the act gives, or in pursuance of the duties it imposes, though he may erroneously exceed those powers, or inadequately discharge those duties. (i) But

(i) *Smith v. Shaw*, 10 B. & C. 284.

this section applies only to actions against commissioners or other officers discharging a public duty, not against assignees or others, for the purpose of trying a disputed private claim. (*k*) Further protection is given to commissioners, in case of a commitment, by other sections, to which we shall shortly advert.

Having thus described the general nature of the office of commissioner,—pointed out the distinction between town and country commissioners,—shewn that the object and duty of a commissioner's office is the administration of the bankrupt's estate; that he exercises this office, subject to the appellate jurisdiction of the Court of Review, from which a further appeal lies to the Chancellor and the House of Lords; we will proceed to detail the *general* powers with which commissioners are armed for the accomplishment of the duties of their office, and will afterwards resume our account of the ordinary course of proceeding on a bankruptcy.

General powers of Commissioners.—By 6 G. 4. c. 16. s. 12. before cited, a general power is given them over the bankrupt's property, of the exercise of which, on specific occasions, we shall hereafter touch. They are also invested with very large authorities, and protected in the execution of them by the following sections of 6 G. 4. c. 16. which enable them to summon and examine witnesses, and the bankrupt himself, compel the production of books, &c. and commit the refractory.

Sect. 33. “And be it enacted, That *after adjudication* it shall be lawful for the commissioners, by writing under their hands, to summon before them any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, or any person whom the commissioners believe capable of giving information concerning the person,

(*k*) *Worth v. Budd*, 2 B. & Ad. 270. *Edge v. Parker*, 8 B. & C. 177. *Carruthers v. Payne*, 5 Bingh. 697.

trade, dealings, or estate of such bankrupt, or concerning any act or acts of bankruptcy committed by him, or any information material to the full disclosure of the dealings of the bankrupt; and it shall be lawful for the said commissioners to require such person to produce any books, papers, deeds, writings, or other documents in his custody or power, which may appear to the commissioners necessary to the verification of the deposition of such person, or to the full disclosure of any of the matters which the commissioners are authorized to inquire into; and if such person so summoned as aforesaid shall not come before the commissioners at the time appointed, having no lawful impediment (made known to the said commissioners at the time of their meeting, and allowed by them), it shall be lawful for the said commissioners, by warrant under their hands and seals, to authorize and direct the person or persons therein named for that purpose, to apprehend and arrest such person, and bring him before them to be examined as aforesaid."

Sect. 34. "And be it enacted, That upon the appearance of any person so summoned or brought before the commissioners as aforesaid, or if any person be present at any meeting of the commissioners, it shall be lawful for them to examine every such person upon oath, either by word of mouth, or by interrogatories in writing, concerning the person, trade, dealings, or estate of such bankrupt, or concerning any act or acts of bankruptcy by such bankrupt committed, and to reduce into writing the answers of every such person, and such answers so reduced into writing the party examined is hereby required to sign and subscribe; and if any such person shall refuse to be sworn, or shall refuse to answer any lawful questions put to him by the said commissioners touching any of the matters aforesaid, or shall not fully answer to the satisfaction of the said commissioners any such lawful questions, or shall refuse to sign and subscribe his examination so reduced into writing as aforesaid (not having any lawful objection allowed by the said commissioners), or shall not produce any books, papers, deeds, and writings, and other documents in his custody or power relating to any of the matters aforesaid, which such person was required by the commissioners to produce, and to the production of which he shall not state any objection allowed by the said commissioners, it shall be lawful for them, by warrant under their hands and seals, to commit him to such prison as they shall think fit, there to remain without bail, until he shall submit himself to them to be sworn, and full

answers make to the satisfaction, to all such lawful questions as shall be put to him, and sign and subscribe such examination, and produce such books, papers, deeds, writings, and other documents as aforesaid in his custody or power, to the production of which no such objection as aforesaid has been allowed."

Sect. 35. "And be it enacted, That where any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, shall be summoned to attend before the said commissioners, every such person shall have such costs and charges as the said commissioners in their discretion shall think fit; and every witness summoned to attend before the commissioners, shall have his necessary expences tendered to him, in like manner as is now by law required upon service of a subpoena to a witness in an action at law."

Sect. 36. "And be it enacted, That it shall be lawful for the commissioners, by writing under their hands, to summon any bankrupt before them, whether such bankrupt shall have obtained his certificate or not; and in case he shall not come at the time by them appointed (having no lawful impediment made known to them at such time, and allowed by them), it shall be lawful for the said commissioners, by warrant under their hands and seals, to authorize and direct any person or persons they shall think fit to apprehend and arrest such bankrupt, and bring him before them; and upon the appearance of such bankrupt, or if such bankrupt be present at any meeting of the said commissioners, it shall be lawful for them to examine such bankrupt upon oath, either by word of mouth, or on interrogatories in writing, touching all matters relating either to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, and to reduce his answers into writing, which examination, so reduced into writing, the said bankrupt shall sign and subscribe; and if such bankrupt shall refuse to be sworn, or shall refuse to answer any questions put to him by the said commissioners touching any of the matters aforesaid, or shall not fully answer to the satisfaction of the said commissioners any such questions, or shall refuse to sign and subscribe his examination so reduced into writing as aforesaid (not having any lawful objection allowed by the said commissioners), it shall be lawful for the said commissioners, by warrant under their hands and seals, to

commit him to such prison as they shall think fit, there to remain without bail until he shall submit himself to the said commissioners to be sworn, and full answers make to their satisfaction to such questions as shall be put to him, and sign and subscribe such examination."

Sect. 37. "And be it further enacted, That it shall be lawful for the commissioners, in manner aforesaid, to summon before them the wife of any bankrupt, and in manner aforesaid, to examine her for the finding out and discovery of the estate, goods, and chattels of such bankrupt, concealed, kept or disposed of by such wife, in her own person, or by her own act, or by any other person, and she shall incur such danger or penalty for not coming before the commissioners, or for refusing to be sworn and examined, or for refusing to sign or subscribe her examination, or for not fully answering to the satisfaction of the commissioners, as is hereby provided against other persons."

Sect. 38. And be it enacted, That if any gaoler to whose custody any bankrupt or other person shall be committed as aforesaid, shall suffer such bankrupt or other person to escape, every such gaoler shall forfeit five hundred pounds."

Sect. 39. "And be it enacted, that if any person be committed by the commissioners for refusing to answer, or for not fully answering any question put to him by the said commissioners, they shall in their warrant of commitment specify every such question: provided, that if any person committed by the commissioners shall bring any habeas corpus, in order to be discharged from such commitment, and there shall appear on the return of such habeas corpus any such insufficiency in the form of the warrant whereby such person was committed, by reason whereof he might be discharged, it shall be lawful for the court or judge before whom such party shall be brought by habeas corpus, and such court or judge is hereby required, to commit such person to the same prison, there to remain until he shall conform, unless it shall be shown to such court or judge by the party committed, that he has fully answered all lawful questions put to him by the commissioners; or if such person was committed for refusing to be sworn, or for not signing his examination, unless it shall appear to such court or judge, that he had a sufficient reason for the same: provided also, that such court or judge shall, if required thereto by the party committed, in case the whole of the examination of the party so committed, shall not have been stated

in the warrant of commitment, inspect and consider the whole of the examination of such party, whereof any such question was a part; and if it shall appear from the whole examination that the answer or answers of the party committed is or are satisfactory, such court or judge shall and may order the party so committed to be discharged."

Sect. 40. "And be it enacted, That in every action in respect of any such commitment brought by any bankrupt or other person committed, the court or judge before which or whom such action is tried shall, if thereto required by the defendant or defendants in such action (in case the whole of the examination of the party so committed shall not have been stated in the warrant of commitment), inspect and consider the whole of such examination; and if upon such inspection and consideration it shall appear to such court or judge that the party was lawfully committed, the defendant or defendants in such action, shall have the same benefit therefrom as if the whole of such examination had been therein stated."

By 1 & 2 W. 4. c. 56. s. 7. the commitment, if by a single commissioner, must be to a messenger, and the person committed, must, within three days, be brought before a Subdivision Court, to which his examination is to be adjourned.

Sect. 99. "And be it enacted, That any bankrupt or other person who shall, in any examination before the commissioners, or in any affidavit or deposition authorized or directed by the present or any act hereby repealed, wilfully and corruptly swear falsely, being convicted thereof, shall suffer the pains and penalties in force against wilful and corrupt perjury; and where any oath is hereby directed or required to be taken or administered, or affidavit to be made by or to any party, such party, if a quaker, shall or may make solemn affirmation, and such quaker shall incur such danger or penalty for refusing to make such solemn affirmation in such matters, when thereto required, as is hereby provided against persons refusing to be sworn; and all quakers who shall, in any such affirmation, knowingly and wilfully affirm falsely, shall suffer the same penalties as are provided against persons guilty of wilful and corrupt perjury; and all persons before whom oaths or affidavits are hereby directed to be

made, are respectively empowered to administer the same, and also such solemn affirmation as aforesaid."

Sect. 100. " And be it enacted, That all sums of money forfeited under this act, or by virtue of any conviction for perjury committed in any oath hereby directed or authorized, may be sued for by the assignees in any of his Majesty's Courts of Record; and the money so recovered (the charges of suit being deducted) shall be divided among the creditors."

Sect. 119. " And be it enacted, That whenever any bankrupt is in prison, or in custody, under any process, attachment, execution, commitment, or sentence, the commissioners may, by warrant under their hands, directed to the person in whose custody such bankrupt is confined, cause such bankrupt to be brought before them at any meeting, either public or private; and if any such bankrupt is desirous to surrender, he shall be so brought up, and the expence thereof shall be paid out of his estate, and such person shall be indemnified by the warrant of the commissioners for bringing up such bankrupt; provided that the assignees may appoint any persons to attend such bankrupt from time to time, and to produce to him his books, papers, and writings, in order to prepare an abstract of his accounts, and a statement to show the particulars of his estate and effects, previous to his final examination and discovery thereof; a copy of which abstract and statement the said bankrupt shall deliver to them ten days at least before his last examination."

Persons, whose attendance is required by the commissioners, under any of these provisions, are privileged from arrest *eundo, morando, et redeundo*; the bankrupt himself, besides this common law protection, has a further one afforded him, by 6 G. 4. c. 16. s. 117. which will be hereafter set out.

Proceedings from Fiat to Adjudication.

When we turned aside to the inquiries just concluded, we had arrived at the issuing of that instrument, whence the Court of Bankruptcy and the commissioners derive their jurisdiction, viz. the *fiat*, the form of which is as follows:

(In case of a London Bankruptcy.)

I hereby authorise A. B., of —, to prosecute his complaint against B. C., of —, in the Court of Bankruptcy.

BROUGHAM, C.

(In case of a Country Bankruptcy.)

I hereby authorize A. B., of —, to prosecute his complaint against B. C., of —, at Liverpool, in the county of Lancaster, before E. F., G. H., and I. K., esquires.

JOHN LEACH, M. R.

The commissioners being thus authorized, the petitioning creditor must attend before them and prove his debt, the trading, and the act of bankruptcy. In order to facilitate the ascertainment of these points, st. 6 G. 4. c. 16. s. 24. enacts,

“ That it shall be lawful for the commissioners, after they shall have taken such oaths as aforesaid, by writing under their hands, to summon before them any person whom they shall believe capable of giving any information concerning the trading of or any act or acts of bankruptcy committed by the person or persons against whom such commission is issued, and also to require any person so summoned to produce any books, papers, deeds, and writings, and other documents in the custody, possession, or power of such person, which may appear to the said commissioners to be necessary to establish such trading or act or acts of bankruptcy; and it shall be lawful for the said commissioners to examine any such person upon oath, by word of mouth, or interrogatories in writing, concerning the trade of or any act or acts of bankruptcy committed by the person or persons against whom such commission shall have issued; and every such person so summoned, shall incur such danger or penalty for not coming before the commissioners, or for refusing to be sworn and examined, or for not fully answering to the satisfaction of the said commissioners, or for refusing to sign or subscribe his examination, or for refusing to produce or for not producing any such book, paper, deed, writing, or document, as is hereby provided as to persons summoned after the adjudication of bankruptcy.”

See ante, pp. 385, 6, 7, 8, 9.

The debt, trading, and act of bankruptcy being established, the party is *adjudged a bankrupt* according to 6 G. 4. c. 16. s. 24. which enacts that,

“ The commissioners, upon proof made before them of the petitioning creditor's debt or debts, and of the trading and act or acts of bankruptcy of the person or persons against whom such commission is issued, shall thereupon adjudge such person or persons Bankrupt.”

Appeal against Adjudication.

The *adjudication* being an *ex parte* proceeding, it is but fair to provide the bankrupt with an easy method of appeal from it: this is accordingly done by stat. 1 & 2 W. 4. c. 51. ss. 17 and 18. viz.

“ Be it enacted, That if any trader adjudged bankrupt shall be minded to dispute such adjudication, and shall present a petition praying the reversal thereof to the said Court of Review, such petition to be presented within two calendar months from the date of such adjudication if such trader shall be then residing within the united kingdom, or within three calendar months from the date aforesaid if then residing in any other part of Europe, or within one year from the date aforesaid if then residing elsewhere, or within such other time as the said court shall allow, (not exceeding one year, to be computed from the date aforesaid,) such Court of Review shall proceed to hear and decide on the said petition; or, at the option of the said bankrupt and on his finding such security for costs (if the said court shall think fit to require any security) as by the said court shall be approved, shall direct an issue to try any matter of fact affecting the validity of such adjudication by a jury, to be duly impannelled and sworn for that purpose, before the Chief judge or any one or more of the other judges of the Court of Bankruptcy; and if the verdict on such issue shall not be set aside, on application made to the said Court of Review, within one month after the said trial, or if the adjudication of the commissioner shall not be set aside by the said Court of Review on the petition aforesaid, such verdict or such adjudication of the said commissioner shall in all cases, as against the said bankrupt, and also as against

the petitioning creditor, and as against any assignee to be chosen of any such bankrupt's estate and effects, and as against all persons claiming under the said assignees, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was or was not a bankrupt at the date of such adjudication, any other act, debt, or trading than the act, debt, or trading proved at such trial notwithstanding: providing always, that an appeal shall be to the Lord Chancellor from the decision of the said Court of Review, upon matter of law or equity, or on the refusal or admission of evidence only.

“ Provided always, and be it further enacted, That after any such issue shall have been tried as aforesaid, it shall and may be lawful for the Lord Chancellor, on petition to him, to be presented within one calendar month after such verdict, and upon notice thereof to the bankrupt, upon special circumstances, to be submitted to the said Lord Chancellor, to order that another fiat do issue at the instance of any other than the former petitioning creditor against the said bankrupt, and that such fiat shall and may be supported by any debt, trading, or act of bankruptcy other than those given in evidence on the trial of such issue.”

Death of Bankrupt after Adjudication.

If the bankrupt die after adjudication, the commissioners may proceed as though he were living. (1)

Proceedings consequent upon Adjudication.

Notice in Gazette.—By 6 G. 4. c. 16. s. 25. the commissioners are required forthwith to give notice of adjudication in the London Gazette, and thereby appoint *three* public meetings for the bankrupt to surrender and conform, which number is altered to *two* by stat. 1 & 2 W. 4. c. 56. s. 20. the last of such meetings is to be on the forty-second day after the publication in the Gazette, and the choice of assignees is to take place at the first meeting.

(1) 6 G. 4. c. 16. s. 26.

Summons to Surrender.—The commissioners also sign a summons to the bankrupt to surrender; which must be left at his usual abode, or personally served on him, if in prison: disobedience to this is punishable by transportation, or fine and imprisonment. (m) The section in which these provisions are contained will be set out hereafter. The surrender must be before three o'clock on the forty-second day after notice in writing; but by 6 G. 4. c. 16. s. 113.

“The Lord Chancellor shall have power, as often as he shall think fit, from time to time to enlarge the time for the bankrupt surrendering himself for such time as the Lord Chancellor shall think fit, so as every such order be made six days at least before the day on which such bankrupt was to surrender himself.

Treatment of Bankrupt surrendering.—The treatment of the bankrupt after his surrender is regulated by the following clauses of 6 G. 4. c. 16.

Sect. 114. “And be it enacted, That it shall be lawful for the commissioners, before the choice of assignees, and after such choice for the assignees, with the approbation of the commissioners, testified in writing under their hands, from time to time to make such allowance to the bankrupt out of his estate, until he shall have passed his last examination, as shall be necessary for the support of himself and his family.”

Sect. 115. “And be it enacted, That if any bankrupt apprehended by any warrant of the commissioners shall, within the time hereby allowed for him to surrender, submit to be examined, and in all things conform, he shall have the same benefit as if he had voluntarily surrendered.”

Sect. 116. “And be it enacted, That the bankrupt, after the choice of assignees, shall (if thereto required) forthwith deliver up to them, upon oath, before a Master, ordinary or extraordinary, in Chancery, or justice of the peace, all books of account, papers, and writings, relating to his estate, in his custody or power, and discover such as are in the custody or power of any other person; and every such bankrupt, not in prison or custody, shall at all times after such sur-

(m) 6 G. 4. c. 16. s. 112.

render, attend such assignees upon every reasonable notice in writing for that purpose, given by them to him, or left at his house, and shall assist such assignees in making out the accounts of his estate; and such bankrupt, after he shall have surrendered, may, at all seasonable times before the expiration of the said forty-two days, or such farther time as shall be allowed to him to finish his examination, inspect his books, papers, and writings, in the presence of his assignees, or any person appointed by them, and bring with him each time any two persons to assist him; and every such bankrupt, after he shall have obtained his certificate, shall upon demand in writing given to him, or left at his usual place of abode, attend the assignees, to settle any accounts between his estate and any debtor to, or creditor thereof, or attend any court of record to give evidence touching the same, or do any act necessary for getting in the said estate, for which attendance he shall be paid five shillings per day by the assignees out of his estate; and if such bankrupt shall, after such demand as aforesaid, not attend, or on such attendance refuse to do any of the matters aforesaid, without sufficient cause shewn to the commissioners for such refusal, and by them allowed, the assignees making proof thereof upon oath before the commissioners, the said commissioners may, by warrant directed to such person as they shall think proper, cause such bankrupt to be apprehended and committed to such prison as they shall think fit, there to remain until he shall conform to the satisfaction of the said commissioners, or of the Lord Chancellor."

Sect. 117. "And be it enacted, That the bankrupt shall be free from arrest or imprisonment by any creditor in coming to surrender; and after such surrender during the said forty-two days, and such further time as shall be allowed him for finishing his examination, provided he was not in custody at the time of such surrender; and if such bankrupt shall be arrested for debt, or on any escape warrant in coming to surrender, or shall after his surrender be so arrested within the time aforesaid, he shall, on producing the summons under the hands of the commissioners, to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged; and if any officer shall detain any such bankrupt after he shall have shown such summons to him, so signed as aforesaid, such officer shall forfeit to such bankrupt, for his own use, the sum of five pounds for every day he shall detain such bankrupt, to be recovered by action of debt in any court of record at Westminster, in the name of such bankrupt, with full costs of suit."

Sect. 118. " And be it enacted, That it shall be lawful for the commissioners, at the time appointed for the last examination of the bankrupt, or any enlargement or adjournment thereof, to adjourn such examination *sine die*, and he shall be free from arrest or imprisonment for such time, not exceeding three calendar months, as they shall by indorsement upon such summons as aforesaid appoint, with like penalty upon any officer detaining such bankrupt after having been shown such summons."

Warrant and Messenger.—The commissioners also at this period issue what is called the *warrant of seizure*, in conformity to stat. 6 G. 4. c. 16. which contains the following enactments.

Sect. 27. " And be it enacted, That it shall be lawful for any person appointed by the commissioners, by their warrant under their hands and seals, to break open any house, chamber, shop, warehouse, door, trunk, or chest of any bankrupt, where such bankrupt or any of his property shall be reputed to be, and seize upon the body or property of such bankrupt; and if the bankrupt be in prison or in custody, it shall be lawful for the person so appointed as aforesaid to seize any property (his necessary wearing apparel only excepted,) in the custody or possession of such bankrupt, or of any other person, in any prison or place where such bankrupt is in custody."

Sect. 28. " And be it enacted, That it shall be lawful for the person so appointed by the commissioners as aforesaid, to break open any house, chamber, shop, warehouse, door, trunk, or chest of such bankrupt in Ireland, where any of the property of such bankrupt shall be reputed to be, and seize the same; provided such warrant as aforesaid shall have been verified upon oath by the attorney or solicitor suing out the commission, before the mayor or other chief magistrate of the city, borough, or town corporate, where, or near to which the said commission is executed, and verified under the common seal thereof, or the seal of the office of such mayor or other magistrate; and provided also, that the person thereby appointed shall, before a justice of the peace residing in the county where such property shall be reputed to be, depose upon oath that he is the person named in such warrant."

Sect. 29. " And be it enacted, That in all cases where it shall be made to appear to the satisfaction of any justice of peace in England

or Ireland, that there is reason to suspect and believe that property of the bankrupt is concealed in any house, premises, or other place not belonging to such bankrupt, such justice of peace is hereby directed and authorized to grant a search warrant to the person so deputed by the commissioners as aforesaid, and it shall be lawful for such person to execute the same in like manner, and such person shall be entitled to the same protection as is allowed by law in execution of a search warrant for property reputed to be stolen and concealed."

Sect. 30. " And be it enacted, " That if in the execution of any warrant of seizure so granted by the commissioners as aforesaid, it shall be necessary to break open any house, chamber, shop, warehouse, door, trunk, or chest of such bankrupt in Scotland, where any of the property of such bankrupt shall be reputed to be, or to seize and get possession of such property; such warrant after having been verified upon oath as aforesaid, may be backed or indorsed with the name of a judge ordinary or justice of the peace in Scotland, who are hereby required, within their respective jurisdictions, to back or indorse the same; and such warrant so indorsed shall be sufficient authority to the person bringing such warrant, and to all officers of the law in Scotland, to execute the same within the county or burgh wherein it is so indorsed, and in virtue thereof to break open the house, chamber, shop, warehouse, door, trunk, or chest of such bankrupt, and to seize and take possession of such property, to be distributed under the said commission, or otherwise dealt with according to law."

Sect. 31. " And be it enacted, That no action shall be brought against any person so appointed by the commissioners, for any thing done in obedience to their warrant prior to the choice of assignees, unless demand of the perusal and copy of such warrant hath been made or left at the usual place of abode of such person or persons by the party or parties intending to bring such action, or by his or their attorney or agent, in writing, signed by the party or parties demanding the same, and unless the same hath been refused or neglected for six days after such demand; and if after such demand and compliance therewith any action be brought against the person so appointed as aforesaid, without making the petitioning creditor or creditors defendant or defendants, if living, on producing and proving such warrant at the trial of such action, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction

in the commissioners; and if such action be brought against the petitioning creditor or creditors and the person so appointed as aforesaid, the jury shall, on proof of such warrant, give their verdict for the person so appointed as aforesaid, notwithstanding any such defect of jurisdiction as aforesaid; and if the verdict shall be given against the petitioning creditor or creditors, the plaintiff or plaintiffs shall recover his or their costs against him or them, to be taxed so as to include such costs as the plaintiff or plaintiffs are liable to pay to the person so appointed as aforesaid."

Sect. 32. "And be it enacted, That in any such action so brought as aforesaid against the petitioning creditor or creditors, either alone or jointly with the person so appointed by the commissioners as aforesaid, for any thing done in obedience to their warrant, proof by the plaintiff or plaintiffs in such action that the defendant or defendants, or any of them, are petitioning creditors, shall be sufficient for the purpose of making such defendant or defendants liable, in the same manner, and to the same extent, as if the act complained of in such action had been done or committed by such defendant or defendants."

The person thus appointed and protected, is styled the *messenger*, and it has been decided that obstruction to him is a contempt of court. (*n*) His statutable protection under sections 31 and 32, only extends up to the choice of assignees. His remedy for the amount of his bill is either by action or petition; (*o*) for expenses incurred before the choice of assignees, he must proceed against the petitioning creditor; and for expenses incurred afterwards, against the assignees. (*p*)

Provisional Assignee.—In case of a country bankruptcy, (for in a town bankruptcy the official assignee, the nature of whose office will be presently explained, is the sole assignee, until the choice of others by the creditors,) (*q*) the commis-

(*n*) Anon. 2 Eq. Ab. 98. Exp. Hartop, 9 Ves. 109. Exp. Johnson, 1 Page, 1 Rose, 1. Exp. Dixon, 8 Ves. G. & J. 23.
104.

(*o*) Hartop v. Jukes, 2 M. & S. 438. 43. and the cases above cited.

Billings v. Waters, 1 Stark. 363. Exp. (*q*) Stat. 1 & 2 W. 4. c. 56. sect. 22.

sioners may, if they please, appoint a *provisional assignee* of the bankrupt's property, by virtue of 6 G. 4. c. 16. sect. 45. which enacts,

“That it shall be lawful for the commissioners as often as they shall think fit, by writing under their hands to appoint one or more person or persons an assignee or assignees of the bankrupt's real and personal estate, or of any part thereof, which assignee or assignees shall or may be removed at the meeting of the creditors for the choice of assignees, if they shall think fit; and such assignee or assignees so removed shall deliver up and assign all the estate of the bankrupt come to his or their possession to the assignees so chosen as herein-after mentioned, and all the estate of the bankrupt, which shall be so delivered up and assigned, shall be as effectually and legally vested in the assignees so chosen as aforesaid, as if the first assignment had been made to them by the commissioners; and if such first assignee or assignees shall not within ten days after notice given of the said choice of assignees, and of their consent to accept such assignment, signified to the first assignee or assignees by writing under their hands, make such assignment and delivery as aforesaid, every such assignee shall forfeit two hundred pounds.”

Proof of Debts.

In order that the main object of the bankrupt laws, viz. the equal distribution of the trader's property among his creditors, may be accomplished, it is obviously necessary that strict regulations should be established, designating the manner in which creditors may, by proving their debts, entitle themselves to share in such distribution, and designating also those claims which are to be considered *debts*, so as to entitle the persons proving them to share in the distribution as creditors. We will consider, therefore, *First*, the mode of proof; *Secondly*, what debts are proveable; and, *Thirdly*, we will touch on some excepted cases, in which a creditor may obtain satisfaction of his demand, without availing himself of the distribution of the trader's property under the bankrupt act.

Mode of Proof.

First, then, with regard to the mode of proof, we have seen that the commissioners, immediately upon adjudication, appoint two meetings ; at these

“ and at every other meeting by them appointed for proof of debts (whereof and of the purport whereof ten days’ notice shall have been given in the London Gazette), every creditor of the bankrupt may prove his debt by his own oath ; and all bodies politic and public companies incorporated or authorized to sue or bring actions, either by charter or act of Parliament, may prove by an agent, provided such agent shall in his deposition swear that he is such agent as aforesaid, and that he is authorized to make such proof ; and if any creditor shall live remote from the place of the meeting of the commissioners, he may prove by affidavit, sworn before a Master in Chancery, ordinary or extraordinary ; or if such creditor shall live out of England, by affidavit sworn before a magistrate where such creditor shall be residing, and attested by a notary public, British minister or consul, and no creditor shall pay any contribution on account of any such debt ; provided, that it shall be lawful for the said commissioners to examine upon oath, either by word of mouth or by interrogatories in writing, every person claiming to prove a debt under the said commission, or to require such further proof, and to examine such other persons in relation thereto, as they shall think fit.”

The above is the mode of proof prescribed by 6 G. 4. c. 16. sect. 46. the right to prove by affidavit is extended by 1 & 2 W. 4. c. 56. sect. 34. viz.

“ And be it enacted, That it shall be lawful for any creditor to make proof of his debt by affidavit, sworn before one of the said judges or commissioners, or before a Master in Chancery, ordinary or extraordinary, or, if such creditor shall live out of England, by affidavit sworn before a magistrate where such creditor shall be residing, and attested by a notary public, British minister or consul ; subject nevertheless to such rules and orders touching the personal attendance of any creditor to make such proof according to the existing laws and practice in bankruptcy as the said Court of Review, with the consent of the Lord Chancellor, shall from time to time make and direct.”

By a peculiar provision in 6 G. 4. c. 16. sect. 53,—

“The person effecting any policy of insurance upon ships or goods with any person, as a subscriber or underwriter, becoming bankrupt, shall be entitled to prove any loss to which such bankrupt shall be liable in respect of such subscription, although the person so effecting such policy was not beneficially interested in such ships or goods, in case the person or persons so interested is not or are not within the United Realm.”

The commissioners, of course, have a discretion, whether they will or will not allow the debt as sufficiently proved; subject to the appeal to the Court of Review, given by 1 & 2 W. 4. c. 56. sect. 31. from their decision on any point of law or equity, or on the refusal or admission of evidence; and as their jurisdiction is both legal and equitable, they can look into the consideration of the alleged debt, notwithstanding an award, a verdict, or perhaps a judgment. (*r*)

Proof by Order.—There are some instances in which a party cannot prove without a special *order* from the court above; *ex. gr.* where a bankrupt executor claims to prove against his own estate, or a guardian in behalf of an infant creditor, or another person in behalf of a lunatic. (*s*) In such cases the court will, in making the order, add such provisions as it considers proper for the security of the dividends.

Claims.—There are cases in which, although a party have no immediate right to prove, he is, upon satisfying the commissioners that he will be able to establish such a right, allowed to enter a *claim* for the purpose of securing his dividend. A debt on the balance of an unliquidated account is a proper

(*r*) Exp. Butterfill, 1 Rose, 192. Bro. C. C. 596. Exp. Moody, 2 Rose, 413. Wolcot v. Hall, 2 Bro. C. C. 306. Exp. Kemshed, 1 Rose, 149. See 1 V. & B. 214. per Lord Eldon. Exp. Belton, 1 Atk. 251. Exp. Maltby,

(*s*) Exp. Shaw, 1 G. & J. 127. Exp. 1 Rose, 387. Exp. Clarke, 2 Rose, Marshal, ib. 163, n. Exp. Leeke, 2 575.

subject of *claim*. (t) So an agent may *claim* for his absent principal. (u) By 6 G. 4. c. 16. sect. 53. the obligee in a bottomry or respondentia bond, and the insured in a policy of insurance are admitted to *claim*, and may prove after a loss.

Proof by Creditor holding security.—There are some peculiar rules respecting the admission to proof of creditors holding securities for their debts. Such persons have, as will be more fully explained in a subsequent part of this chapter, considerable advantages over the bankrupt's other creditors, being able to avail themselves of their securities as far as they will go, towards payment of their demands. It is, therefore, highly proper, to guard against their abuse of the privilege which the law allows them.

The chief rule on this subject is, that a creditor, holding a security, shall not be suffered to prove, unless he will give it up, or its value have been ascertained by sale. (w) If, therefore, he consider his security unequal to the payment of his debt, he should apply to have it sold, and to be admitted to prove for the residue.

When such a creditor is desirous of voting in the choice of assignees, the court will sometimes permit proof of his debt, deducting the value of the security, and imposing such terms that justice may be done to the estate; (x) but this is only where his right to the security is undisputed. (y)

A joint-creditor holding a *separate security* from one of the co-debtors, may prove against the *joint* estate, without surrender or sale of his security. (z) And so the holder of a *joint-security* may prove against the *separate* estate of one

(t) Exp. Simpson, 1 Atk. 70.

(u) Busk v. Walsh, 4 Taunt. 295.

(w) See per L. Eldon, 2 Rose, 64, and Gen. Order, 8 March 1794.

(x) Exp. Hopley, 2 J. & W. 221.

Exp. Greenwood, Buck. 323. Eden. 109.

(y) Exp. Hopley, 1 Jac. & W. 423. Exp. Barclay, 1 G. & J. 272.

(z) Exp. Peacock, 2 G. & J. 27. See Exp. Freen, ib. 250.

debtor, and recover what he can against the other. (a) But of course more than twenty shillings in the pound must not be received in the whole. Where a security is deposited generally, and the creditor has two demands, one proveable, the other not, he may apply his security to the demand which is not proveable. (b)

Election of Remedy.—The legislature, considering it inequitable, that a creditor should, at once, avail himself of two methods of legal remedy, has enacted in 6 G. 4. c. 16. s. 59,

“ That no creditor who has brought any action, or instituted any suit against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit; and in case such bankrupt shall be in prison or custody at the suit of or detained by such creditor, he shall not prove or claim as aforesaid, without giving a sufficient authority in writing for the discharge of such bankrupt; and the proving or claiming a debt under a commission by any creditor shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed; provided that such creditor shall not be liable to the payment to such bankrupt or his assignees, of the costs of such action or suit so relinquished by him; and that where any such creditor shall have brought any action or suit against such bankrupt jointly with any other person or persons, his relinquishing such action or suit against the bankrupt shall not affect such action or suit against such other person or persons: provided also, that any creditor who shall have so elected to prove or claim as aforesaid, if the commission be afterwards superseded, may proceed in the action as if he had not so elected, and in bailable actions shall be at liberty to arrest the defendant *de novo*, if he had not put in bail below, or perfected bail above, or if the defendant has put in or perfected such bail, to have recourse against such bail, by requiring the bail

(a) Co. B. L. 137. Exp. Bennett, 2
Atk. 258. Exp. Parr, 1 Rose, 76.

(b) Exp. Havard, Co. B. L. 140.
Exp. Arkley, ib. 141. Exp. Hunter, 6
Ves. 94.

below to put in and perfect bail above within the first eight days in term, after notice in the London Gazette of the superseding such commission, and by suing the bail upon their recognizance, if the condition thereof is broken."

Upon the subject of this section the reader is referred to the authorities cited in the margin; (c) the first of which, establishes that proof of a debt can not be *pleaded* in bar to an action for the same debt, though it is ground for an application to expunge the proof, or stay the proceedings. A surety, who pays the debt of a bankrupt principal, to a creditor who has proved, is entitled, as we shall presently see, to stand in that creditor's place as to the proof. It seems, however, that he is not bound by the creditor's election to prove, so as to be considered as having himself elected within the meaning of this clause, (d) unless he have, himself, received a dividend under such proof, (e) or otherwise shown his election. (f)

Expunging Proof.—Lastly, where a debt has been improperly proved, the commissioners may expunge it. Stat. 6. G. 4. c. 16. s. 60. enacting,

"That whenever it shall appear to the assignees, or to two or more creditors who have each proved debts to the amount of twenty pounds or upwards, that any debt proved under the commission is not justly due either in whole or in part, such assignee or creditors may make representation thereof to the commissioners, and it shall be lawful for the said commissioners to summon before them and

(c) *Harley v. Greenwood*, 5 B. & A. 95. *Exp. Dickson*, 1 Rose, 98. *Exp. Hardenbergh*, 1 Rose, 204. *Exp. Joseph*, ib. 184. *Exp. Glover*, 1 G. & J. 270. *Blannin v. Taylor*, 1 Gow. 199. *Watson v. Medex*, 1 B. & A. 121. *Howell v. Golledge*, 5 Taunt. 174. *Heath v. Hall*, 4 Taunt. 326.

(d) *Mead v. Braham*, 3 M. & S. 91. See *Townend v. Downing*, 14 East. 565.

(e) *Exd. Lobbon*, 17 Ves. 334.

(f) What amounts to an election, vide *Exp. Hardenbergh*, 1 Rose, 204. *Exp. Lord*, 2 Rose, 241. *Exp. Bonzannet*, 1 Rose, 421. *Exp. Ward*, 1 Atk. 152. See *Kemp v. Potter*, 6 Taunt. 549. *Exp. Cunzos*, 1 Br. C. C. 270. *Exp. Prowse*, 1 G. & J. 92. 1 Co. B. L. 148. *Exp. Knowell*, 13 Ves. 192. *Exp. Cundall*, 6 Ves. 446. *Exp. Arundell*, 18 Ves. 231.

examine upon oath any person who shall have so proved as aforesaid, together with any person whose evidence may appear to the commissioners to be material, either in support of or in opposition to any such debt; and if the said commissioners, upon the evidence given on both sides, or (if the person who shall have so proved as aforesaid shall not attend to be examined, having been first duly summoned, or notice having been left at his last place of abode) upon the evidence adduced by such assignees or creditors as aforesaid, shall be of opinion that such debt is not due either wholly or in part, the said commissioners shall be at liberty to expunge the same, either wholly or in part, from the proceedings: provided, that such assignees or creditors requiring such investigation shall, before it is instituted, sign an undertaking to be filed with the proceedings, to pay such costs as the commissioners shall adjudge to the creditor who has proved such debt as aforesaid, such costs to be recovered by petition; provided also, that such assignees or creditors may apply in the first instance by petition to the Lord Chancellor, or that either party may petition against the determination of the commissioners.

Where a proof has been expunged, dividends which have been received under it must be refunded. (g)

What Debts proveable.

Before enumerating those debts which are *proveable*, we must observe, that no debt can be so, if it arise out of an illegal contract; or, was barred by the statute of limitations; (h) or, was contracted after the issuing of the *fiat*, or after the act of bankruptcy *on which the fiat issued*, and with notice thereof; (i) or if there be no consideration for it, though it has been held that a voluntary bond is proveable if there be a surplus. (k) Moreover, though we shall presently see that a debt is payable, although *contingent*; yet, it

(g) Exp. Burn. Exp. Dewdney, 2 Rose, 59 n.

(h) Exp. Dewdney, 15 Ves. 498. Exp. Roffey, 2 Rose, 245.

(i) 6 G. 4. c. 47. Bamford v. Burrell, 2 B. & P. 1. Exp. Bowness, 2 M. & S.

479. Robinson v. Vale, 2 B. & C. 762.

(k) Gardner's Assignees v. Skinner, 2 Sch. & Lef. 228.

is not so if *unliquidated*, that is, if there be no means of ascertaining what is due in respect of it : and therefore, a demand of damages for the commission of a tort, and in some cases for breach of contract, where the amount of damages to be recovered, and, indeed, the question whether any be recoverable, cannot be solved without the intervention of a jury, is not proveable under a bankruptcy, unless the amount have been previously ascertained by verdict ; (l) thus a demand of damages, for ploughing meadow ground in breach of the terms of a lease, is not proveable, not even though it be agreed in the lease, that the damages in respect of the breach shall be estimated at a particular sum of money. (m) And it is further to be observed respecting such damages, that even though they have been assessed by a jury, they are not considered as a liquidated debt, proveable under the bankruptcy, till judgment has been actually signed ; (n) and the like rule holds with respect to the costs, which become payable to the defendant, on a verdict in his favour, or a nonsuit. (o) The effect of this rule was sometimes avoided by the relations of judgment to the first day of the term, (p) but that relation is now abolished. (q)

The acceptor of a bill of exchange contracts a debt by his acceptance, and therefore, if the indorser be compelled to take it up, even after fiat issued, he may prove for the amount. (r) The indorsee of a bill or note indorsed after the bankruptcy,

(l) See Eden, 129. et seq. Cullen, 110. et seq. where the chief authorities collected ; and see Goodtitle v. North, Dougl. 583. Parker v. Crole, 5 Bing. 63. Parker v. Morton, 6 T. R. 695. Attwood v. Partridge, 4 Bing. 209.

(m) 3 Wilson, 270. Cullen, 112.

(n) Buss v. Gilbert, 2 M. & S. 70. Bire v. Moreau, 4 Bing. 57.

(o) Haswell v. Thorogood, 7 B. & C.

705. Walker v. Barnes, 5 Taunt. 778. Brough v. Adcock, 7 Bing. 650.

(p) Exp. Birch, 4 B. & C. 880. Greenway v. Fisher, 7 B. & C. 436. Sed vide Brough v. Adcock, 7 Bing. 650.

(q) Reg. Gen. Plead. Hil. T. 1834. Pl. 3.

(r) Exp. Brymer, Co. B. L. 178. Cowley v. Dunlop, 7 T. R. 565. Joseph v. Orme, 2 B. & P. 180.

can only prove such debt as his indorser could have proved at the time of the bankruptcy. (s)

The creditors of the bankrupt, may, in respect of their right to prove, be divided into three classes, viz.

I. Those who receive dividends on their entire demands.

II. Those who receive dividends on less than their entire demands.

III. Those who are peculiarly favoured in the distribution of the bankrupt's assets.

Creditors who receive dividends on their entire demands are,

1. Persons to whom the bankrupt was indebted at the time of the bankruptcy.

2. *Bonâ fide* creditors before fiat.

By 6 G. 4. c. 16. s. 72,

“ Every person with whom any bankrupt shall have really and *bonâ fide* contracted any debt or demand before the issuing the commission against him, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be admitted to prove the same, and be a creditor under such commission, as if no such act of bankruptcy had been committed, provided such person had not, at the time the same was contracted, notice of any act of bankruptcy by such bankrupt committed.”

3. Sureties, bail, and persons liable for bankrupt.

By section 52.

“ Any person who at the issuing the commission shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, if he shall have paid the debt, or any part thereof in discharge of the whole debt, (although he may have paid the same after the commission issued,) if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the said commission which such creditor possessed or would be entitled to in respect of such proof; or if the creditor shall

(s) Exp. Isbester, 1 Rose, 20. See Exp. Deey, 2 Cox. 423.

not have proved under the commission, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety liable or bail as aforesaid after an act of bankruptcy committed by such bankrupt; provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed."

As the jurisdiction in bankruptcy is both legal and equitable, a party who is, in equity, surety for another is within this section, though, at law, he and that other may be both principals. (t) The words "*liable for any debt of the bankrupt*" have lately become subject to a good deal of discussion; they comprehend several cases which would not be covered by the word "*surety*." A solvent partner who has paid the partnership debt, is "*liable*" for his bankrupt co-partner within its meaning: (u) so is an accommodation acceptor or indorser *liable* for the party accommodated. (w) But one co-surety cannot it seems be called a person liable for a debt of the other, within the meaning of this clause. (x) The section only applies to cases where the surety has paid the whole debt, or part in discharge of the whole; not to a case where he paid part in discharge of his own personal liability. (y) A surety in a bond to the King is within it. (z) And though the suretyship must commence before notice of the bankruptcy, yet, if it do commence before that time, it may be continued afterwards, *ex. gr.* by the surety accepting a new bill in renewal of the acceptance which constituted his

(t) Wood v. Dodgson, 2 M. & S. 195.
See Exp. Lloyd, 1 Rose, 4.

(u) Aflalo v. Fourdinier, 6 Bing. 309.

(w) Bassett v. Dodgin, 9 Bingh. 658.
For a case without the meaning of the word see Yallop v. Ebers, 1 B. & Ad. 698.

(x) Clements v. Langley, 2 Nev. & Mann. 274; sed quære whether this rule extends to all cases of co-suretyship, see the judgment of Patteson, J.

(y) Soutten v. Soutten, 5 B. & A. 852.

(z) Wescott v. Hodges, 1 B. & A. 12.

original suretyship. (a) The bankrupt's certificate will, in consequence of this section, not only discharge him against the surety as to the principal debt, but also as to any special damage which the surety may have sustained in consequence of his liability. (b)

4. Obligees in bottomry bond, and persons insured.

By sect. 53. it is enacted,

"That the obligee in any bottomry or respondentia bond, and the assured in any policy of insurance made upon good and valuable consideration, shall be admitted to claim, and after the loss or contingency shall have happened, to prove his debt or demand in respect thereof, and receive dividends with the other creditors, as if the loss or contingency had happened before the issuing the commission against such obligor or insurer."

5. Annuity creditors, and sureties for annuities.

Sections 54 & 55. enact as follows:

Sect. 54. "And be it enacted, That any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission." (c)

Sect. 55. "And be it enacted, That it shall not be lawful for any person entitled to any annuity granted by any bankrupt, to sue any person who may be collateral surety for the payment of such annuity, until such annuitant shall have proved under the commission against such bankrupt for the value of such annuity, and for the payment thereof; and if such surety after such proof pay

(a) *Stedman v. Martinnant*, 13 East. 427.

(b) *Vansandau v. Corsbie*, 8 Taunt. 550. 3 B. & A. 13.

(c) See *Lyde v. Mynn*, 4 Sim. 505.

the amount proved as aforesaid, he shall be thereby discharged from all claims in respect of such annuity ; and if such surety shall not (before any payment of the said annuity subsequent to the bankruptcy shall have become due) pay the sum so proved as aforesaid, he may be sued for the accruing payments of such annuity, until such annuitant shall have paid or satisfied the amount so proved, with interest thereon at the rate of four per cent. per annum, from the time of notice of such proof, and of the amount thereof being given to such surety ; and after such payment or satisfaction, such surety shall stand in the place of such annuitant in respect of such proof as aforesaid, to the amount so paid or satisfied as aforesaid by such surety ; and the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant or of such surety in respect of such annuity ; provided that such surety shall be entitled to credit in account with such annuitant for any dividends received by such annuitant under the commission, before such surety shall have fully paid or satisfied the amount so proved as aforesaid."

6. Persons having debts payable on a contingency.

Sect. 56. " And be it enacted, That if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon ; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends ; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

For an able commentary on this section, the reader is referred to the Judgment delivered by Tindal, C. J. in *Exp. Tindal*, 8 Bingh. 403.

Creditors who receive dividends on less than their entire demands.

We proceed now to the second class of creditors, viz. those who have a right to receive dividends on less than their entire demands. This class consists of persons whose debts are at the time of the bankruptcy *debita in presenti, solvenda in futuro*. They are provided for by section 51, which enacts as follows:

“And be it enacted, That any person who shall have *given credit* to the bankrupt upon valuable consideration, for any money or other matter or thing whatsoever which shall not have become payable when such bankrupt committed an act of bankruptcy, (d) and whether such credit shall have been given upon any bill, bond, note, or other negotiable security or not, shall be entitled to prove such debt, bill, bond, note, or other security, as if the same was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive, at the rate of five per cent., to be computed from the declaration of a dividend to the time such debt would have become payable, according to the terms upon which it was contracted.”

Creditors peculiarly favoured.

The third class of creditors are such as are peculiarly favoured by the legislature. These are,

1. Servants, clerks and apprentices, concerning whom the enactments of 6 G. 4. c. 16. are as follows:

Sect. 48. “And be it enacted, That when any bankrupt shall have been indebted, at the time of issuing the commission against him, to any servant or clerk of such bankrupt, in respect of the wages or salary of such servant or clerk, it shall be lawful for the commissioners, upon proof thereof, to order so much as shall be so

(d) These words include the drawer and indorser of a bill becoming bankrupt, as well as the acceptor, *Stacey v. Burns*, 7 East, 439. *McCarthy v. Barrow*, *ibid.* 437, in *notis.* 3 Wils. 16.

due as aforesaid, not exceeding six months' wages or salary, to be paid to such servant or clerk out of the estate of such bankrupt; and such servant or clerk shall be at liberty to prove under the commission, for any sum exceeding such last-mentioned amount. (e)

Sect. 49. "And be it enacted, That where any person shall be an apprentice to a bankrupt at the time of issuing of the commission against him, the issuing of such commission shall be and enure as a complete discharge of the indenture or indentures whereby such apprentice was bound to such bankrupt; and if any sum shall have been really and *bona fide* paid, by or on the behalf of such apprentice to the bankrupt, as an apprentice fee, it shall be lawful for the commissioners, upon proof thereof, to order any sum to be paid to or for the use of such apprentice which they shall think reasonable, regard being had, in estimating such sum, to the amount of the sum so paid by or on behalf of such apprentice to the bankrupt, and to the time during which such apprentice shall have resided with the bankrupt previous to the issuing of the commission."

The benefit of this latter section was given where the execution of the indenture had been neglected, but the fee had been paid, and the apprentice had served. (f)

2. Friendly Societies.

Section 33 G. 4. c. 54. s. 10. contains peculiar provisions in favor of Friendly Societies. (g)

Having thus enumerated the several species of debts which the legislature has rendered proveable; we will subjoin a few remarks on certain claims, occasionally incident to debts; the creditor's right in respect of which comes frequently into question. These are *Interest* and *Costs*.

Interest.—With respect to *interest*, the general rule is, that no interest is proveable, save that which is reserved by contract; in other cases it is only matter of damages, and is

(e) A traveller is within this clause, Exp. Neale, 1 M. & M. 194; so is a workman working by the piece: Exp. Grellier, *ibid.* 101.

(f) Exp. Haynes, 2 G. & J. 122.

(g) See this section commented on, Eden, 124.

given as such in an action, and those damages not being liquidated before the bankruptcy, cannot be proved. (*h*) The custom of trade, the allowance of interest on a statement of accounts, and other circumstances of a like nature, are evidence that interest was reserved by contract, within the meaning of this rule. (*i*) Where interest is allowed, it is calculated only down to the date of the *fiat*. (*k*) We shall hereafter have occasion to remark on the allowance of interest in the event of a surplus. There is an exception from the rule not to allow interest unless contracted for, in favor of bills of exchange and promissory notes, introduced by 6 G. 4. c. 16. s. 17. which enacts,

“That in all future commissions against any person or persons liable upon any bill of exchange or promissory note, whereupon interest is not reserved, overdue at the issuing the commission, the holder of such bill of exchange or promissory note, shall be entitled to prove for interest upon the same, to be calculated by the commissioners to the date of the commission, at such rate as is allowed by the Court of King’s Bench, in actions upon such bills or notes.”

Costs.—We have already observed, that a *defendant* who has obtained a verdict, or non-suited the plaintiff, cannot prove for his costs, unless judgment be signed before the bankruptcy. With respect to *plaintiffs*, stat. 6. G. 4. c. 16. sect. 58. enacts,

“That if any plaintiff in any action at law or suit in equity, or petition in bankruptcy or lunacy, shall have obtained any judgment, decree, or order against any person who shall thereafter become bankrupt for any debt or demand in respect of which such plaintiff or petitioner shall prove under the commission, such plaintiff or petitioner shall also be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy.”

(*h*) Exp. Furneaux, 2 Cox. 219.

Brooke, 12 Ves. 128. cited Durnford v.

(*i*) Exp. Hankey, 3 B. C. C. 504.

Durnford, 12 Ves. 127.

Exp. Williams, 1 Rose, 399. Exp.

(*k*) Bromley v. Goodere, 1 Atk. 79. Exp. Bennett, 2 Atk. 527. See 14 Ves. 573.

As the law stood before this section, costs in equity could not be proved, unless taxed at the time of the bankruptcy. (*l*) With respect to costs at law, the rule is—*First*, that in actions *ex delicto*, there is no debt with which the costs can be incorporated till judgment; and therefore, that in case of a bankruptcy before judgment, but after verdict, they cannot be proved. (*m*) *Secondly*. In actions *ex contractu*, where the debt for which the action is brought, was originally proveable, and the bankruptcy has occurred after verdict, though before judgment, the costs *de incremento*, are said to be proveable, being considered as incorporated by the verdict with the original debt; although not ascertained till judgment. (*n*) *Thirdly*. Where the verdict was not obtained till after bankruptcy, the costs are not proveable. (*o*) Where an action was compromised, the defendant apologising, and agreeing by rule of court, to pay the plaintiff's costs, it was held that the Master's *allocatur* rendered those costs proveable under the defendant's bankruptcy, which afterwards took place. (*p*)

Partnership Debts.

There are some peculiar considerations applicable to the proof of partnership debts upon a bankruptcy.

All the partners in a firm may become bankrupt together, or some or one only may become bankrupt, the rest remaining solvent. For, acts of bankruptcy are, we have seen, not to be raised by implication, and a partner cannot become a bankrupt, unless he personally commit an act of bankruptcy; therefore, when the resident partner in a bank shut up the house, and absented himself, and the bank stopped payment, this

(*l*) Co. B. L. 192. R. v. Davis, 9 385. Aylett v. Harford, Bl. 1317. Exp. East. 320. Exp. Eicke, 1 G. & J. 261. Helm, 1 Mont. & M. 70. and see Lord

(*m*) Buss v. Gilbert, 2 M. & S. 70. Henley's observations, Di. 136.

Exp. Poucher, 1 G. & J. 385. Birè v. (*o*) Exp. Hill, 11 Vesey, 646.

Moreau, 4 Bingh 58.. (*p*) Riley v. Byrne, 2 B. & Adol.

(*n*) See Exp. Poucher, 1 G. & J. 780.

was held evidence of his own bankruptcy, not of that of the non-resident partner. (q) Of course the separate creditor of one partner cannot sue out a joint fiat; (r) but we have seen that a creditor of the firm may sue out a joint fiat against all the partners, if all have become bankrupt; or against several, if several have become bankrupt; (s) or a separate fiat against one of them, if one of them have become bankrupt. (t)

Where the whole firm has become bankrupt, and a fiat issued against it, the whole of the joint property of the firm, and of the separate property of each of its members, (the distinction between which we have seen in the first chapter of this treatise,) is to be administered, and passes to the assignees when appointed. (u) But under a separate bankruptcy, the property to be administered consists of the separate estate of the bankrupt, together with such part of the joint property, as the bankrupt himself would be entitled to. (w) And as the bankruptcy occasions a dissolution of the partnership, the assignees of the bankrupt partner become tenants in common with the solvent partner of the partnership effects, and hold the bankrupt's undivided share thereof, subject to the state of the partnership accounts. (x)

Hence it follows, that in case of the bankruptcy of part of an entire firm, it is necessary to take an account of the whole

(q) *Mills v. Bennett*, 2 M. & S. 556. *Exp. Mavor*, 19 Ves. 543. For cases where the whole firm became bankrupt, see *Spencer v. Billing*, 3 Camp. 312. *Capper v. Desanges*, 3 Moore, 4. *Deffle v. Desanges*, 8 Taunt. 671. *Exp. Gardner*, 1 V. & B. 77. *Eckhardt v. Wilson*, 8 T. R. 140. *Dutton v. Morrison*, 17 Ves. 200.

(r) *Prosser v. Smith*, Holt, 442.

(s) 6 G. 4. cap. 16. sect. 16.

(t) *Crisp v. Perritt*, Willes, 467. *Smith v. Oriel*, 1 East. 368.

(u) Vide *Exp. Cooke*, 2 P. Wms. 500. *Exp. Baudier*, 1 Atk. 98. *Hague v. Rolleston*, 4 Burr. 2174. *Jervis v. Tayleur*, 3 B. & A. 557.

(w) *Horsey's case*, 3 P. Wms. 23. *Eddie v. Davidson*, Dougl. 627. *Bolton v. Puller*, 1 B. & P. 539. *Barker v. Goodair*, 11 Ves. 85.

(x) *West v. Skip*, 1 Ves. 232. *Fox v. Hanbury*, Cowp. 445. *Taylor v. Field*, 4 Ves. 396. *Smith v. Stokes*, 1 East. 363. *Smith v. Oriel*, 1 East. 368. *Holderness v. Shackels*, 8 B. & C. 612.

state of the partnership affairs, in order to ascertain *what* is to be administered; (y) and in case of the bankruptcy of an entire firm, it is also, as we shall immediately see, necessary to take such an account, in order to ascertain *how* the assets are to be administered. (z)

For the rule as to the application of joint and separate property to the payment of creditors, is, that the joint estate shall be applied to the joint debts; the separate to the separate debts; and the surplus of each reciprocally to the creditors remaining on the other. (a)

This rule is qualified by some exceptions, which establish that, in the following cases, a joint creditor may prove against the separate estate, *pari passu* with the separate creditors.

First. A joint creditor, who is the petitioning creditor in a separate *fiat*, may so prove, for the *fiat* is in the nature of an execution for his debt against the separate estate of the bankrupt partner. (b) But it is otherwise where a joint creditor sues out a *fiat* against A. *as surviving partner of B.*, for then the above reason ceases to apply. (c)

Secondly. Joint creditors may prove against the separate estate, where there is no joint estate, *and* no solvent partner. (d) These two conditions must be strictly observed; for the exception does not apply, if there be a joint estate, however small, (e) unless it be utterly incapable of being realized; (f) nor if there be a solvent partner, *i. e.* a partner who

(y) See Order, Loughborough, 8th March 1794.

(z) See Exp. Elton, 3 Ves. 242. Barker v. Goodair, 11 Ves. 85. Dutton v. Morrison, 17 Ves. 209. Exp. Farlow, 1 Rose, 421.

(a) Exp. Elton, 3 Ves. 242. See Exp. Clay, 6 Ves. 814. Exp. Alcock, 11 Ves. 603. Exp. Taitt, 16 Ves. 193. See 6 G. 4. cap. 16. sect 62.

(b) Exp. Hall, 9 Ves. 349. Exp.

Ackermann, 14 Ves. 604. Exp. De Tastet, 1 Rose, 10.

(c) Exp. Barned, 1 G. & J. 309.

(d) Exp. Sadler, 15 Ves. 52. Exp. Machell, 2 V. & B. 216. See Exp. Wylie, 2 Rose, 393. Exp. Nolte, 2 G. & J. 295.

(e) Exp. Peake, 2 Rose, 54. In re Lee, *ib. n.*

(f) Per L. Eldon, *ibid.* Exp. Hill, 2 N. R. 191. *n.*

has not become bankrupt, even though there be no joint property, (g) (unless indeed, it be impossible that he should be reached,) (h) the principle being, that while there is any other fund, however small, to which they may resort, the joint creditors cannot compete with the separate ones.

Thirdly. Where there are no separate debts, or, which is the same thing, where the joint creditors undertake to pay them. (i) The reason of this exception, if such it can, with propriety, be called, is obvious.

However, though the above are the rules respecting proof in order to a dividend, there is one purpose, viz. that of assenting to, or dissenting from, the certificate, for which separate creditors may prove under joint fiats, and joint creditors under separate fiats; the former by Gen. Order, 8th March 1794; the latter by 6 G. 4. cap. 16. s. 62. which gives them also a right to vote for assignees, viz.

Sect. 62. "And be it enacted, That in all commissions against one or more of the partners of a firm, any creditor to whom the bankrupt or bankrupts is or are indebted, jointly with the other partner or partners of the said firm, or any of them, shall be entitled to prove his debt under such commission for the purpose only of voting in the choice of assignees under such commission, and of assenting to or dissenting from the certificate of such bankrupt or bankrupts, or of either of such purposes; but such creditor shall not receive any dividend out of the separate estate of the bankrupt or bankrupts until all the separate creditors shall have received the full amount of their respective debts, unless such creditor shall be a petitioning creditor in a commission against one member of a firm."

Proof between Partners.

It sometimes happens that a partner is indebted to the firm, or the firm to one of its partners; in such case the rule is, that an individual partner cannot prove against the joint

(g) Exp. Kensington, 14 Ves. 447. (i) Exp. Chandler, 9 Ves. 35. Exp. Janson, 3 Madd. 229. Buck. 227. Hubbard, 13 Ves. 424.

(h) See Exp. Pinkerton, 6 Ves. 814 n.

estate in competition with the joint creditors ; for as they are his own creditors also, he has no right to withdraw any part of the funds available for the payment of their debts; nor can those partners of a firm who remain solvent, prove against the separate estate of a member of that firm, in competition with his separate creditors, unless the joint creditors be first paid twenty shillings in the pound and interest ; for they might, by doing so, prevent a surplus of the separate estate from accruing, which surplus would be available towards payment of the joint creditors. (k) Indeed, if the solvent partner will pay all the joint debts, he may then prove against the separate estate in competition with the separate creditors of his bankrupt co-partner. In such case he will be “ a person liable for a debt of the bankrupt who has paid the debt.” (l) But to bring him within this class of creditors, there must have been an actual *satisfaction* of the joint debts either by payment of the *whole*, or part, *in discharge of the whole*. Nothing less will be sufficient. (m)

Where a solvent partner pays all the joint debts, and proves against the separate estates of his co-partners, (more than one having become bankrupt,) for the respective sums each is bound to contribute, it has been made a question whether, if the estate of one of the bankrupts is insufficient to pay his share of the debts, the solvent partner can come upon the other bankrupt's estate for his proportion of the deficiency. Sir John Leach decided in the negative, (n) on the ground that proof is equivalent to payment ; and therefore, that the

(k) Exp. Reeve, 9 Ves. 558. Exp. Taylor, 2 Rose, 175. Exp. Young, 2 Ogle, Mont. 351. Exp. Broome, 1 Rose, 40. 3 V. & B. 35.
Rose, 69. Exp. Rawson, Jac. 277.
Co. B. L. 503. 505.

(l) 6 G. 4. c. 16. s. 52. Exp. Watson, 4 Madd. 477. Wood v. Dodgson, 2 M. & S. 195. Affalo v. Fourdrinier, 6 Bingham. 309. Exp. King, 17 Ves. 115. Exp. Rix, Mont. 237. Exp. Moore, 2 Glyn & Jam. 166. Exp. Carter, 2 Glyn & Jam. 233. Exp. Ellis, 2 Glyn & Jam. 312.
(n) Exp. Watson, Buck. 449. Exp. Smith, id. 492.

solvent partner having proved for each bankrupt's whole quota, must be regarded as having been paid it. Lord Eldon, however, has dissented from this case, (o) and from the reason on which it was founded, saying he agreed that *proof* was equivalent to *payment*, when it produced payment, but doubted whether it was payment when it produced nothing.

Where there are two distinct firms carrying on distinct trades, but consisting partly of the same members, one firm may prove against the estate of the other firm for goods supplied in the former's distinct line of business, at least, if the estate against which proof is admitted, is not liable with that of the firm proving to any joint debts. (p) Thus, the firm of A. B. C. and D. might prove against the firm of A. B. C. and E., for those two firms could not be jointly liable; but it was decided that A. could not prove against the firm of A. and S., for A. being himself one of that firm, was liable jointly with S. for debts contracted by it. (q)

Proof between Estates.

In analogy to the rule above stated, it is also held, that where all the members of a firm become bankrupt, the separate estate of one partner cannot claim against the joint estate of the firm, in competition with joint creditors; nor the joint estate against the separate estate in competition with separate creditors. (r)

Where money or effects have been fraudulently abstracted from one estate to benefit the others, there is an exception; for instance, if one partner were, in violation of the partnership articles, to draw more than his share out of a bank, in which the money of the firm had been deposited; the sum so

(o) Exp. Hunter, Buck. 552. Exp. Moore, 2 Glyn & Jam. 172.

(p) See Exp. Hesham, 1 Rose, 146. Exp. Adams, 1 Rose, 305. Exp. Cook, Mont. 228.

(q) Exp. Adams, supra. Sed vide Exp. Hesham, contra.

(r) Exp. Burrell, Exp. Pine, C. B. L. 503. Exp. Grill, ibid. 506. Exp. Ogle Mont. 351.

drawn by him in fraud of the partnership articles, would be considered in the light of property stolen from the joint estate, and would be proveable by the joint estate against his separate estate: (s) the question whether a case be one of fraud, must of course depend upon its peculiar circumstances.

Where *one* (t) or more members of a firm carry on a distinct trade, proof will be admitted between the estates of the general and particular firm *pari passu* with the creditors, when the debt sought to be proved is for goods furnished, in the same way as if they had been wholly unconnected in trade, by the one firm to the other. (u) But, excepting in the case of bankers, (w) this rule will not be applicable where the debt has arisen only from money advanced by the one firm to the other. (x)

Contribution between Estates.—As there may be proof between estates, so there may be contribution between them, where one has been subjected to an undue proportion of a charge, which ought to have fallen equally on both. (y)

Election of Proof.

Where a creditor has a joint and separate security, either in one and the same instruments, or in different instruments,

(s) Exp. Cust, C. B. L. 596. See Exp. Harris, 2 V. & B. 213. Exp. Emly, 1 Rose, 64. Exp. Assignees of Lodge and Fendall, 1 Ves. J. 166. Exp. Younge, 3 V. & B. 31. Exp. Smith, 1 G. & J. 74. Exp. Watkins, M. & Mac. 157.

(t) See Lord Eldon's observations in Exp. Sillitoe, 1 G. & J. 374. Sed vide those of Sir J. Leach, in Exp. Brenchley, Exp. Stroud, and Exp. Castell, 2 G. and J. 124—7.

(u) Case of Shakeshaft, Stirrup, and Salisbury, 6 Ves. 123. 743. 747. Exp. Hargreaves, 1 Cox, 440. Exp. St. Barbe, 11 Ves. 413. Exp. St. Johns, Co. B. L. 510. Exp. Castell. Exp. Stroud, 2 G. & J. 124—7. Exp. Sillitoe, 1 G. & J. 374. Exp. Cook, Mont. 228.

(w) Exp. Castell.

(x) Exp. Sillitoe.

(y) Exp. Willock, 2 Rose, 392. Exp. Wylie, ib. 393. See Rogers v. Mackenzie, 4 Ves. 752.

there is an arbitrary rule, the good sense of which has been much questioned, which forces him to elect whether he will prove against the joint or separate estate. (z) There is, however, an exception to this rule, in cases where the parties to the security are separate firms, and the holder had no notice of their connection, (a) and perhaps, also, even though he had notice. (b)

Remedy without Proof.

Having now touched on the principal rules concerning *proof*, let us proceed to notice certain cases in which the creditor has a remedy without proving.

Set-off.

By stat. 6 G. 4. c. 16. s. 50. it is enacted,

“That where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him, and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively, and every debt or demand hereby made proveable against the estate of the bankrupt, may also be set-off in manner aforesaid against such estate; provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed.”

It will be perceived from a perusal of this section, that the right of set-off given by it, is not confined to cases where there are *mutual debts*, but extends to cases of *mutual credit*, which includes not only pecuniary demands, but also, cases

(z) See numerous cases collected, Eden, 181. and see Exp. Husband, 2 G. & J. 4.

(a) Exp. La Forest, Co. B. L. 261.

Exp. Adam, 2 Rose, 36.

(b) Exp. Walker, Exp. Wenslay, 1 Rose, 441. 2 V. & B. 254. See 8 Ves. 546.

where that which will terminate in a debt exists on both sides. (c) Whoever takes a bill, is to be considered as giving a credit to the acceptor, and whoever takes a note, a credit to the drawer. (d) But it is otherwise, where a bill was deposited with the party who attempts to set it off, not in order to create a debt, but for some specific purpose; (e) nor is any case within the above section, in which there is not either a debt, or something which is from its nature likely to end in a debt. (f) Moreover, in order to constitute such a *mutuality* as this section intends, the debts, from and to the bankrupt, must be due in the same right; (g) thus there can be no set-off between joint, and separate, debts. (h)

The only condition imposed on the right of set-off, is contained in the words, "*provided the person claiming the benefit of such set-off, had not, when credit was given, notice of an act of bankruptcy by such bankrupt committed.*" Notice of the act of bankruptcy is therefore the sole criterion or dividing point: so that where the defendant, in an action brought by the assignees of certain bankers, claimed to set off notes which he had industriously obtained after the bank had stopped payment, it was held that he had a right to do so, the notes having been taken before he knew of the commission of an act of bankruptcy. (i) But a debtor to the firm

(c) *Easum v. Cato*, 5 B. & A. 861. *Arbouin v. Tritton*, 1 Holt, 408. Exp. *Boyle, Co.* B. L. 542. *Smith v. Hodson*, 4 T. R. 211. *Hankey v. Smith*, 3 T. R. 507. Exp. *Prescott*, 1 Atk. 230. *Olive v. Smith*, 5 Taunt. 56. *French v. Fenn, Co.* B. L. 536. Exp. *Deeze*, 1 Atk. 228. *Atkinson v. Elliott*, 7 T. R. 378.

(d) Per Bayley, J. in *Collins v. Jones*, 10 B. & C. 783. unless, indeed, he holds it as a mere agent or trustee for some other person who is the real creditor on it. *Belcher v. Lloyd*, 10 Bingham, 316.

(e) *Key v. Flint*, 8 Taunt. 81. and see *Belcher v. Lloyd*.

(f) *Rose v. Sims*, 1 B. & Adol. 521. *Sampson v. Burton*, 2 B. & B. 89. *Rose v. Hart*, 8 Taunt. 499. Exp. *Ockenden*, 1 Atk. 234.

(g) Exp. *Whitehead*, 1 G. & J. 39. *West v. Pryce*, 2 Bingham, 555.

(h) Exp. *Christie*, 10 Ves. 105. Exp. *Twogood*, 11 Ves. 517. Exp. *Rose, Buck*. 121. *Staniforth v. Fellowes*, 1 Marsh. 184.

(i) *Hawkins v. Whitten*, 10 B. & C. 217. *Dickson v. Cass*, 1 B. & Adol. 355.

was not allowed to set off notes, which he had taken after notice that three out of four partners had committed acts of bankruptcy, (k)

By stat. 6 G. 4. c. 94. s. 6. the owner of goods pledged by a factor, may, after redeeming them, set off the money paid for their redemption, against any debt due from him to the estate of the bankrupt factor.

Securities and Liens on the Bankrupt's Property.

There are certain cases in which a creditor is allowed to satisfy himself out of some part of the bankrupt's property on which he has obtained a security. We will first consider the nature of the security. Secondly, the time by which the creditor, in order to render it available, must have obtained it.

First, as to the nature of the security.

Executions.—An execution served and levied by seizure of the bankrupt's property, is a security of this class. It is said to be *levied* for this purpose as soon as the goods are seized. (l) There was, however, one class of executions much less favored than others, for by stat. 6 G. 4. c. 16. s. 108,

“No creditor, though for a valuable consideration, who shall sue out execution upon a judgment obtained by default, (m) confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors.”

However, this provision turning out extremely mischievous, it was enacted by stat. 1 W. 4. c. 7. s. 7. “That no judgment signed or execution issued on a *cognovit actionem*, signed after declaration filed or delivered, or judgment by default, confession, or *nihil dicit*, according to the practice of the court in actions *commenced adversely*, and not by

(k) *Dickson v. Cass.*

(l) *Giles v. Grover*, 9 Bingham 128.
Godson v. Sanctuary, 4 B. & Ad. 255.
 6 G. 4. c. 16. s. 81.

(m) A final judgment after a judgment by default, is within the meaning of these words, *Cumming v. Welsford*, 6 Bingham 502.

collusion for the purpose of fraudulent preference, shall be deemed or taken to be within the said provision."

As this last enactment mentions only judgments in actions commenced *adversely*, an execution on the judgment in an action not commenced *adversely*, is not protected by it; for instance, an execution upon a judgment entered up under a warrant of attorney: (n) yet even these are rendered valid by the 81st section of stat. 6 G. 4. c. 16. if levied more than two calendar months before the issuing of a fiat. (o) And where the execution has been perfected by sale before the act of bankruptcy, the creditor has a right to retain the proceeds; (p) for by the sale his debt is put an end to, and he ceases to be a creditor having security. Nor will the court interfere in a summary manner, even where the bankruptcy happens before a sale; the statute not making the execution void, but only enacting that the execution creditor shall share rateably. (q) In order that the execution on a judgment either by *warrant of attorney* or *cognovit* may be valid, the provisions of stat. 3 G. 4. c. 39. intituled *An Act for preventing frauds on creditors by secret warrants of attorney to confess judgment*, must have been complied with; since the execution will be considered fraudulent and void, unless the *warrant of attorney* or *cognovit* have been filed within twenty-one days as there directed, or unless execution have issued within that period.

Crown process.—An extent binds the goods of the king's debtor from its *teste*; and as the bankrupt's property therein

(n) *Crosfield v. Stanley*, 4 B. & Adol. 87.

(o) *Godson v. Sanctuary*, 4 B. & Adol. 255. But a warrant of attorney, to be available against the assignees, must be in conformity with 3 G. 4. c. 39. *Wilson v. Whittaker*, 1 M. & M. 8. See *Dillon v. Edwards*, 2 M. & P. 550.

The same observation applies to a *cognovit*.

(p) *Wymer v. Kemble*, 6 B. & C. 479. In *re Washbourn*, 8 B. & C. 444.

(q) *Taylor v. Taylor*, 5 B. & C. 392. In *re Washbourn*, 8 B. & C. 444. See *Mitchell v. Knott*, 2 G. & J. 293. *Exp. Botcherby*, 2 G. & J. 367.

does not pass out of him into his assignees till their appointment, it will be bound by an extent tested before such appointment; for though, in common cases, the assignees, when appointed, take by relation to the act of bankruptcy, yet such relation does not apply against the crown, whose rights are not affected by the bankrupt laws. (r) As to the bankrupt's debts, they are bound as against the assignees from the teste of the extent, although the bankrupt's debtor is discharged by payment before inquisition, and without notice of the crown process. (s) The real property of the bankrupt was formerly bound by an extent, unless the conveyance were enrolled before its teste; and it seems now to be bound unless the certificate of the appointment of the assignees be enrolled before that period. (t)

Other crown process, such as a warrant to levy for land-tax money, though not binding from the date as an extent from its teste, creates a lien in favor of the crown from the time of *seizure*, if the assignees have not been appointed. (u)

An abuse of these privileges of the crown for purposes of fraud, is guarded against by 6 G. 4. c. 16. s. 71. which enacts,

“That if any real or personal estate or debts of any bankrupt be extended, after he shall have become bankrupt, by any person, under pretence of his being an accountant of or debtor to the king, the commissioners may examine upon oath whether the said debt was due to such debtor or accountant upon any contract originally made between such accountant and the bankrupt, and if such contract was originally made with any other person than the said debtor or accountant, or in trust for any other person or persons, the commissioners may sell and dispose of such real or personal estate or debts for the benefit of the creditors under the commission, and such sale

(r) Dyer, 67. 2 Ves. 295. West, 58. Queen v. Arnold, 7 Vin. Abr. 104. A. G. v. Capel, 2 Str. 480. See 4 T. R. 411.

(s) West, 164. See Queen v. Arnold, 7 Vin. Abr. 104. A. G. v. Etwell,

Bunb. 199. R. v. Green, ib. 265. R. v. Glenny, 2 Price, 396.

(t) R. v. Hopper, West, 149. Christ. 533. 1 & 2 W. 4. c. 56. s. 27.

(u) Brassey v. Dawson, Stra. 978.

shall be valid against the said extent, and all persons claiming under it; and any person to whom the said real and personal estate or debts shall be bargained, sold, granted, or assigned by the commissioners, shall have and may recover the same against any person who shall detain the same."

Mortgages and Pledges.—A legal mortgage gives the mortgagee a right to retain the property mortgaged, until his debt is satisfied, nor can the assignee redeem without paying interest up to the time of redemption. (*w*) An *equitable* mortgage by the deposit of title deeds, is in like manner upheld in courts of bankruptcy; (*x*) and even in a court of law it has been determined, that an equitable mortgagee, who has received the profits of the estate mortgaged, cannot be forced to refund to the mortgagor's assignees. (*y*) A *pledge* of personal property is in the nature of a mortgage, and can only be redeemed by payment of the sum advanced upon it. (*z*)

Liens.—A *lien*, such as we have described in the preceding chapter is available against the assignees: so is a vendor's *legal* lien on a thing sold but not paid for: so also is the *equitable* right of a vendor of real estate to a lien for his unpaid purchase money (*a*) against the vendee, volunteers, purchasers with notice, or persons claiming equitable interests under the vendee. (*b*)

Secondly. As to the *time* at which the creditor who relies on one of the above securities must have become possessed of it.

(*w*) 7 Vin. Abr. 100.

(*x*) Hankey v. Vernon, 2 Cox, 12. Exp. Corning, 9 Ves. 115. Exp. Haigh, 11 Ves. 403. Exp. Finden, ib. Hiern v. Mill, 13 Ves. 114. Exp. Mountford, 14 Ves. 606. Exp. Coombe, 17 Ves. 369.

(*y*) Sumpter v. Cooper, 2 B. & Adol.

223. See Garry v. Sharratt, 10 B. & C. 718.

(*z*) Prec. Chanc. 419. 2 Vern. 691.

(*a*) Exp. Loaring, 2 Rose, 79. Exp. Peake, 1 Mad. 346. Exp. Parkes, 1 G. & J. 228. Exp. Dicken, Buck. 115.

(*b*) See Sugden, V. & P. cap. 12. Blackburne v. Gregson, Eden's ed. 1 Bro. C. C. 424.

If he acquire it, *bonâ fide*, before an act of bankruptcy, that is sufficient; for the title of the assignees only extending back to that period, cannot, in such case, interfere with his; and so it is, by 6 G. 4. c. 16. s. 81. if acquired, *bonâ fide*, (c) more than two calendar months before the date and issuing of the fiat; provided the creditor had not then notice of any prior act of bankruptcy; but where one fiat has been superseded, and another issued within two months afterwards, the security must have been acquired more than two months before the former fiat. The above section will, hereafter, be considered at large; it is enough, for the present, to observe, that it overrides and controuls the 108th section of the same act, which directs,

“ That no creditor having security for his debt, or having made any attachment in London, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied, by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt before the bankruptcy.”

This section is held only to apply to cases not within the 81st, that is, to cases happening within two months before fiat. (d) We have already considered its application to executions on judgments by default, confession, or *nil dicit*, in actions *not commenced adversely*, which executions, to be valid, must either have been completed by sale before the act of bankruptcy, or levied by seizure more than two months before fiat, but will be unsustainable if the seizure took place within two months of fiat, and there have been no sale before the act of bankruptcy.

(c) See *Bevan v. Nunn*, 9 Bingham. (d) *Godson v. Sanctuary*, 4 B. & 110. *Tucker v. Barrow*, 1 M. & M. 137. Adol. 81.

Landlord's Right of Distress.

A landlord of the bankrupt stands in a very peculiar situation. He has a right to distrain for the rent due to him, upon goods on the premises, though the demise itself was not till after an act of bankruptcy, and though, at the time of the distress, the fiat have issued, and the messenger is in possession: (e) and if the bankrupt, after committing an act of bankruptcy, pay the rent under threat of such distress, the landlord seems entitled to retain it. (f) If, however, he neglect to use his right of distress, he can only come in with the other creditors: (g) and, by stat. 6 G. 4. c. 16. s. 74,

“No distress for rent made and levied after an act of bankruptcy upon the goods or effects of any bankrupt (whether before or after the issuing of the commission), shall be available for more than one year's rent, accrued prior to the date of the commission, but the landlord or party to whom the rent shall be due shall be allowed to come in as a creditor under the commission for the overplus of the rent due, and for which the distress shall not be available.”

The Assignees.

Having seen towards the payment of what debts the bankrupt's property is applicable, let us enquire by whom it is collected, and in whom vested for the purpose of such application. This brings us to the office, rights, and duties of the assignees.

Office, Rights, and Duties of Assignees.

Assignees of a bankrupt are either official or chosen. *Official Assignees* are officers of the Court of Bankruptcy, and

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| (e) Buckley v. Taylor, 2 T. R. 603. | Mavor v. Croome, 1 Bing. 261. |
| Exp. Plummer, 1 Atk. 103. Exp. | (g) Exp. Descharmes, 1 Atk. 103. |
| Jaques, Exp. Dillon, ib. 104. | Exp. Grove, ib. Braddyl v. Ball, 1 Bro. |
| (f) Stevenson v. Wood, 5 Esp. 200. | C. C. 427. Exp. Devisne, C. B. L. 190. |

are only employed in bankruptcies prosecuted in that court. Their office and duties are described by the following sections of statute 1 & 2 W. 4. c. 56.

Sect. 22. " And be it enacted, That a number of persons not exceeding thirty, being merchants, brokers, or accountants, or persons who are or have been engaged in trade in the city of London or Westminster or the parts adjacent, shall be chosen by the Lord Chancellor to act as official assignees in all bankruptcies prosecuted in the said Court of Bankruptcy; one of which said official assignees shall in all cases be an assignee of each bankrupt's estate and effects, together with the assignee or assignees to be chosen by the creditors; such official assignee to give such security, to be subject to such rules, to be selected for such estate, and to act in such manner as the said chief and other judges, with the consent of the Lord Chancellor, shall from time to time direct; and all the personal estate and effects, and the rents and profits of the real estate, and the proceeds of sale of all the estate and effects, real and personal of the bankrupt, shall in every case be possessed and received by such official assignee alone, save where it shall be otherwise directed by the said Court of Bankruptcy or any judge or commissioner thereof; and all stock in the public funds or of any public company, and all monies, exchequer bills, India bonds, or other public securities, and all bills, notes, and other negotiable instruments, shall be forthwith transferred, delivered, and paid by such official assignee into the Bank of England, to the credit of the accountant general of the High Court of Chancery, to be subject to such order, rule, and regulation, for the keeping of the account of the said monies and other effects, and for the payment and delivery in, investment, and payment and delivery out of the same, as the Lord Chancellor, or the said Court of Review, or any judge of the said Court of Bankruptcy, if authorized so to do by the general order of the same court, shall direct; and if any such assignee shall neglect to make such transfer, delivery, or payment, every such assignee shall be liable to be charged in the same manner as by the said recited act (*h*) is provided in cases of neglect by assignees to invest money in the purchase of exchequer bills, when directed to do so: provided always, that until assignees shall be chosen by the creditors of each bankrupt, such

(*h*) 6 G. 4. c. 16. s. 104. which see post. p. 432.

official assignee so to be appointed to act with the assignee to be chosen by the creditors shall be enabled to act, and shall be deemed to be, to all intents and purposes whatsoever, a sole assignee of each bankrupt's estates and effects.

Sect. 23. " Provided always, and be it enacted, That nothing herein contained shall extend to authorize any such official assignee to interfere with the assignees chosen by the creditors in the appointment or removal of a solicitor or attorney, or in directing the time and manner of effecting any sale of the bankrupt's estates or effects."

Sect. 24. " And be it enacted, That it shall be lawful for the Lord Chancellor, from time to time as any vacancy may occur in the said before-mentioned number of official assignees, to appoint some other such person as aforesaid to fill any vacancy so occurring; and in case of the death or removal of any official assignee who shall have been appointed to act in any bankruptcy, it shall be lawful for the said Court of Bankruptcy, subject to any rules to be made by virtue of this act, to appoint another official assignee of the number hereby prescribed to act in the same bankruptcy in the place of the assignee who shall have so become dead or been removed."

Sect. 57. " And be it enacted, That it shall be lawful for the Commissioner before whom any person shall be adjudged a bankrupt in the said Court of Bankruptcy, or who shall appoint an official assignee under the power herein-before given for that purpose, to order and allow to be paid out of the bankrupt's estate, to the official assignee thereof, as a remuneration for his services, such sum of money as shall appear to such commissioner, upon consideration of the amount of the bankrupt's property, and the nature of the duties to be performed by such official assignee, to be just and reasonable."

Sections 46 and 55. provide for the payment of certain fees by the official assignee, out of the bankrupt's property, to the secretary of bankrupt's accounts.

As to the chosen Assignees.—By 6 G. 4. c. 16. s. 61.

" At the second meeting appointed by the commissioners, (i) as aforesaid, or any adjournment thereof, assignees of the bankrupt's

(i) See ante, p. 393.

estate and effects shall be chosen; and all creditors who have proved debts under the commission to the amount of ten pounds and upwards shall be entitled to vote in such choice; and also any person authorized by letter of attorney from any such creditor or creditors, upon proof of the execution thereof, either by affidavit sworn before a master in chancery, ordinary or extraordinary, or by oath before the commissioners *viva voce*, and in case of creditors residing out of England, by oath before a magistrate where the party shall be residing, duly attested by a notary public, British minister or consul, and the choice shall be made by the major part in value of the creditors so entitled to vote: provided that the commissioners shall have power to reject any person so chosen who shall appear to them unfit to be such assignee as aforesaid, and upon such rejection a new choice of another assignee or assignees shall be made as aforesaid."

By stat. 1 and 2 W. 4. c. 56. s. 20. which substitutes two meetings for three, the choice of assignees is directed to take place at the first meeting.

The first duty of the assignees is to ascertain the validity of the bankruptcy, for which purpose, the petitioning creditor is bound to furnish them with all the information in his power. (*h*) If they can clearly ascertain that it is defective, they may apply to supersede it, though their application will be watched with jealousy; (*i*) nor can they in any other way dispute the validity of the fiat. (*k*)

We have just seen how the official assignees are to deposit or invest the money they receive. In country fiats, regulations are prescribed by 6 G. 4. c. 16. as follows:

Sect. 101. "And be it enacted, That the assignees shall keep an account wherein they shall enter all property of the bankrupt received by them, and all payments made by them on account of the bankrupt's estate, which account every creditor who shall have proved may inspect at all seasonable times; and it shall be lawful for the commissioners, at all times, by writing under their hands, to summon the assignees before them, and require them to produce all books, papers, deeds, writings, and other documents relating to the

(*h*) Exp. Graves, 1 G. & J. 86.

(*k*) Exp. Jeeks, 1 Rose, 393.

(*i*) Exp. Paul, 1 M. & M. 185.

bankruptcy, in their possession ; and if such assignees so summoned shall not come before the commissioners at the time appointed (having no impediment made known to the commissioners at the time of their meeting, and allowed by them), it shall be lawful for the said commissioners, by warrant under their hands and seals, directed to such person as they shall think fit, to cause such assignees to be brought before them ; and upon their refusing to produce such books, deeds, writings, papers, or documents as aforesaid, it shall be lawful for the said commissioners to commit the party so refusing to such prison as they shall think fit, there to remain without bail, until such party shall submit himself to the said commissioners."

Sect. 102. " And be it enacted, that at the meeting of creditors for the choice of assignees, the major part in value of such creditors there present may direct how, and with whom, and where the money received from time to time out of the estate shall be paid in and remain until it be divided ; and if such creditor shall not make such direction as aforesaid, the commissioners shall immediately after such choice, and at the same meeting, make such direction ; but no money shall be directed to be paid into the hands of any of the commissioners, or of the solicitor to the commission, or into any banking house, or other house of trade in which any such commissioner, assignee, or solicitor is interested."

Sect. 103. " And be it enacted, That the commissioners may, as often as it shall appear to them expedient for the bankrupt's estate, direct any money, part of such estate, to be invested in the purchase of exchequer bills, for the benefit of the creditors, and may direct where and with whom such exchequer bills shall be kept, and cause such exchequer bills to be sold when it shall appear to them expedient, and may direct the proceeds thereof to be again laid out in the purchase of exchequer bills, or to be applied for the benefit of the creditors, subject to the control of the Lord Chancellor.

Sect. 104. And be it enacted, That if any assignee shall retain in his hands, or employ for his own benefit, or knowingly permit any co-assignee so to retain or employ any sum to the amount of one hundred pounds or upwards, part of the estate of the bankrupt, or shall neglect to invest any money in the purchase of exchequer bills, when so directed as aforesaid, every such assignee shall be liable to be charged in his accounts with such sum as shall be equal to interest at the rate of twenty per cent. on all such money,

for the time during which he shall have so retained or employed the same, or permitted the same to be so retained or employed as aforesaid, or during which he shall have so neglected to invest the same in the purchase of exchequer bills, and the commissioners are hereby required to charge every such assignee in his accounts accordingly." (l)

Assignees are so far like trustees, that each is separately answerable only for what he may receive, (m) and neither can, apart from the other, give a good discharge for money belonging to the bankrupt's estate. If an assignee become bankrupt, it is provided by 6 G. 4. c. 16. s. 105. that in case of his being indebted to the estate for money retained in his hands, or employed for his own benefit,

"If he shall obtain his certificate it shall only have the effect of freeing his person from arrest and imprisonment; but his future effects (his tools of trade, necessary household goods, and the necessary wearing apparel of himself, his wife and children excepted) shall remain liable for so much of his debts to the estate of which he was assignee, as shall not be paid by dividends under his commission, together with lawful interest for the whole debt."

The court has a general jurisdiction over assignees in matters relating to the bankruptcy, (n) and will compel the performance of their duties, if neglected. One of these duties is to sell the bankrupt's property, and its immediate sale will be enforced upon the application of a creditor; (o) at this sale they cannot themselves become the purchasers, on account of

(l) This section is imperative on the commissioners to charge *twenty* per cent. Exp. Bray, 1 Rose, 144. but this penalty does not attach on the estate of a bankrupt assignee, who has misapplied money, the 105th section providing for that case. Wackerbath v. Powell, Buck. 495. Exp. Goldsmith, 1 G. & J. 405. Where assignees have acted prudently in employing an agent, they are not subject to the penalty, though that agent misapply.

Exp. Wilkinson, Buck. 197. Exp. Belcher, Ambl. 218. In re Earl of Litchfield, 1 Atk. 87.

(m) Per Ld. Hardwicke, Primrose v. Bromley, 1 Atk. 89.

(n) See Exp. Rowton, 17 Ves. 426. Exp. Pease, 19 Ves. 25. Exp. Cowan, 3 B. & A. 123.

(o) Exp. Goring, 1 Ves. J. 168. See 6 Ves. 622. 17 Ves. 514. Exp. Montgomery, 1 G. & J. 338.

their fiduciary character, (q) excepting under very special circumstances, with the permission of the court, and consent of the creditors. (r) In order to facilitate the execution of this part of their duty, and to secure the purchaser of the bankrupt's property, stat. 6 G. 4. c. 16. enacts as follows:

Sect. 78. "And be it enacted, That it shall be lawful for the Lord Chancellor upon the petition of the assignees or of any purchaser from them, of any part of the bankrupt's estate, if such bankrupt shall not try the validity of the commission, or if there shall have been a verdict at law establishing its validity, to order the bankrupt to join in any conveyance of such estate, or any part thereof; and if he shall not execute such conveyance within the time directed by the order, such bankrupt and all persons claiming under him shall be stopped from objecting to the validity of such conveyance; and all estate, right, or title which such bankrupt had therein shall be as effectually barred by such order as if such conveyance had been executed by him."

Sect. 87. "And be it enacted, That no title to any real or personal estate sold under any commission, or under any order in bankruptcy, shall be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the suing out of the commission, or in any of the proceedings under the same, unless the bankrupt shall have commenced proceedings to supersede the said commission, and duly prosecuted the same, within twelve calendar months from the issuing thereof."

As the assignees may be compelled to a strict performance of these duties; so, on the other hand, they are entitled to be reimbursed all necessary expenses; (s) but they are entitled to no more; thus they must not devolve on an accountant, duties which they themselves are competent to discharge, though if such aid be necessary, they are permitted to employ

(q) Exp. Reynolds, 5 Ves. 707. Exp. Lacey, 6 Ves. 625. Exp. James, 8 Ves. 337. Exp. Bennett, 10 Ves. 381. Exp. Spong, 1 Rose, 133. Exp. Andrews, 2 Rose, 410.

(r) See 8 Ves. 352. 1 G. & J. 12.

Exp. Bage, 4 Madd. 459. Anon. 2 Russ. 350. Exp. Morland, 1 M. & M. 76.

(s) 2 G. & J. 55. 179. See Exp. Bray, 1 Rose, 145. Exp. Read, 1 G. & J. 77.

one. The majority of the assignees have a right to nominate the *solicitor to the bankruptcy*, and to regulate his continuance or removal. (t) In order to enable them more effectually to realize the bankrupt's property, 1 & 2 W. 4. c. 56. sect. 35. enacts,

“That in every case the assignees may, with the approbation of the proper subdivision court, appoint the bankrupt himself to superintend the management of the estate, or to carry on the trade for behoof of the creditors, and in all or any other respects they may think fit to aid them in administering the bankrupt's estate and effects, in such manner and on such terms as they may think best for the benefit of the persons interested in the estate.”

By stat. 1 & 2 W. 4. c. 56. sect. 36. it is enacted,

“That the Court of Review shall have power to remove any assignee of any estate; and the order of such court thereupon shall be final and conclusive to all intents and purposes, and not subject to any review by the Lord Chancellor or otherwise.”

This power is sometimes exercised at the instance of creditors, sometimes on the assignee's own application. The mode in which the bankrupt's estate is vested in the new assignee upon a removal, was formerly marked out by stat. 6 G. 4. c. 16. sect. 66. and is now so by 1 & 2 W. 4. c. 56. ss. 25 & 26, which will hereafter be cited.

Interest of Assignees in Bankrupt's Property.

Such being the duties and rights of assignees, it remains to ascertain about what *property* those duties and rights are to be exercised. Let us, therefore, inquire, 1st. What property of the bankrupt vests in his assignees. 2nd. What property belonging at the time of the bankruptcy to other persons vests in them. Under the former head we will consider, *First*, the mode in which property passes from the bankrupt to his assignees. *Secondly*, the nature of the property which so passes. *Thirdly*, the *time* from which their right to it commences.

(t) Anon. 1 Rose, 207. Exp. Scruby, *ibid.* Exp. Tomlinson, 2 Rose, 66.

First, then, as the mode in which property passes from the bankrupt to his assignees.

Stat. 1 & 2 W. 4. c. 56. enacts as follows :

Sect. 25. " And be it enacted, That when any person hath been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws now in force may be assigned by commissioners acting in the execution of a commission against such bankrupt, shall become absolutely vested in and transferred to the assignees or assignee for the time being, by virtue of their appointment, without any deed of assignment for that purpose, as fully to all intents as if such estate and effects were assigned by deed to such assignees and the survivor of them ; and as often as any such assignees shall die, or be lawfully removed, and a new assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee shall by virtue of such appointment vest in the new assignee, either alone or jointly with the existing assignees, as the case may require, without any deed of assignment for that purpose."

Sect. 26. " And be it enacted, That where any person shall have been adjudged a bankrupt, all such present and future real estate of such bankrupt, whether in the United Kingdom of Great Britain and Ireland, or in any of the dominions, plantations, or colonies belonging to his Majesty, as by the said recited act (*u*) is directed to be conveyed by the commissioners to the assignees, shall vest in such bankrupt's assignee or assignees for the time being, by virtue of his or their appointment, without any deed of conveyance for that purpose ; and as often as any such assignee or assignees shall die, or be lawfully removed or displaced, and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed shall by virtue of such appointment vest in the new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose."

Sect. 27. " Provided always, and be it enacted, That where according to any laws now in force any conveyance or assignment of any real or personal property of a bankrupt would require to be registered, enrolled, or recorded in any registry office in England, Wales, or Ire-

(*u*) St. 6 G. 4. c. 16.

land, or in any registry office, court, or other place in Scotland, or any of the dominions, plantations, or colonies belonging to his Majesty, then, in every such case, such certificate as hereafter is described of the appointment of an assignee or assignees shall be registered in the registry office, court, or place wherein such conveyance or assignment as last aforesaid would require to be registered, enrolled, or recorded; and the registry hereby directed shall have the like effect to all intents and purposes as the registry, enrolment, or recording of such conveyance or assignment as last aforesaid would have had; and the title of any purchaser of any such property as last aforesaid, for valuable consideration, without notice of the bankruptcy, who shall have duly registered, enrolled, or recorded his purchase deed previous to the registry hereby directed, shall not be invalidated by reason of such appointment of an assignee or assignees as aforesaid, or the vesting of such property in him or them consequent thereupon, unless the certificate of such appointment shall be registered as aforesaid within the times following; (that is to say,) as regards the United Kingdom of Great Britain and Ireland, within two months from the date of such appointment; and as regards all other places, within twelve months from the date thereof."

Sect. 29. "And be it enacted, That a certificate of the appointment of such assignees, purporting to be under the seal of the said Court of Bankruptcy, shall be received as evidence of such appointment, in all courts and places whatsoever, without further proof."

Secondly, As to the nature of the property which vests in the assignees. By stat. 1 & 2 W. 4. c. 56. ss. 25 & 26. such real and personal property of the bankrupt as the commissioners could have conveyed or assigned to the assignees under 6 G. 4. c. 16. is directed to vest in them on their appointment. Reference, therefore, must be had to stat. 6 G. 4. c. 16. the principal sections of which, on this subject, are as follows:

Sect. 63. "Be it enacted, That the commissioners shall assign to the assignees, for the benefit of the creditors of the bankrupt, all the present and future personal estate of such bankrupt wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall have obtained his certificate; and the commissioners shall also assign as aforesaid all debts due or to be due

to the bankrupt wheresoever the same may be found or known, and such assignment shall vest the property, right, and interest in such debts in such assignees, as fully as if the assurance whereby they are secured had been made to such assignees; and after such assignment, neither the bankrupt nor any person claiming through or under him shall have power to recover the same, nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the City of London or otherwise, but such assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt."

Sect. 64. "And be it enacted, That the commissioners shall, by deed indented and enrolled in any of His Majesty's courts of record, convey to the said assignees, for the benefit of the creditors as aforesaid, all lands, tenements, and hereditaments, except copy or customary-hold, in England, Scotland, Ireland, or in any of the dominions, plantations, or colonies belonging to His Majesty, to which any bankrupt is entitled, and all interest to which such bankrupt is entitled in any of such lands, tenements, or hereditaments, and of which he might, according to the laws of the several countries, dominions, plantations, or colonies, have disposed, and all such lands, tenements, and hereditaments as he shall purchase, or shall descend, be devised, revert to, or come to such bankrupt before he shall have obtained his certificate, and all deeds, papers, and writings respecting the same, and every such deed shall be valid against the bankrupt, and against all persons claiming under him: Provided, that where according to the laws of any such plantation or colony such deed would require registration, enrolment, or recording, the same shall be so registered, enrolled, or recorded, according to the laws of such plantation or colony, and no such deed shall invalidate the title of any purchaser for valuable consideration prior to such registration, enrolment, or recording, without notice that the commission has issued." (v)

Sect. 65. "And be it enacted, That the commissioners shall, by deed indented and enrolled as aforesaid, make sale for the benefit of the creditors as aforesaid of any lands, tenements, and hereditaments, situate either in England or Ireland, whereof the bankrupt is seised

(v) The enrolment required by this section is now to be replaced by an enrolment of the certificate of appointment, 1 & 2 W. 4. c. 56. s. 27. ante, p. 436.

of any estate tail in possession, reversion, or remainder, and whereof no reversion or remainder is in the Crown, the gift or provision of the Crown, and every such deed shall be good against the said bankrupt and the issue of his body, and against all persons claiming under him after he became bankrupt, and against all persons whom the said bankrupt, by fine, common recovery, or any other means, might cut off or debar from any remainder, reversion, or other interest, in or out of any of the said lands, tenements, and hereditaments." (x)

Sect. 66. "And be it enacted, That the Lord Chancellor may, upon petition, order any conveyance or assignment either of the real or personal estate of the bankrupt, made either to assignees appointed by the commissioners or chosen by the creditors, and any enrolment thereof, to be vacated, provided that no title of any purchaser under any conveyance prior to such order be thereby affected, and that no estate previously barred be thereby revived; and the Lord Chancellor may order the commissioners to execute a new assignment or assignments of the debts and effects unreceived and not disposed of by the then assignee or assignees to any other person or persons to be chosen by the creditors as aforesaid, or to execute a new conveyance of the real estate unsold or not conveyed to such person or persons, and in such manner as the Lord Chancellor shall direct; and if such new assignment shall be ordered, the debts and personal estate of the bankrupt shall be thereby vested in such new assignees, and it shall be lawful for them to sue for the same, and to discharge any action or suit, or to give any acquittance for such debts, as effectually as the former assignees might have done; and the commissioners shall, in the two London Gazettes next after the removal of such assignee or assignees, and such new appointment as aforesaid, cause advertisements to be inserted giving notice of such removal and appointment, and directing persons indebted to the bankrupt's estate not to pay any debt to the assignee or assignees so removed; and if such new conveyance as aforesaid shall be ordered as aforesaid, it shall be valid without any conveyance from any former assignee or assignees, or his or their heirs or assigns, provided that the order so made for vacating any bargain and sale be enrolled: and any bargain and sale

(x) Under this section the commissioners had power to convey the estate tail immediately to a purchaser. It is now, however, repealed by stat. 2 & 3

W. 4. c. 74. s. 55, and other provisions substituted for it, which will be immediately enumerated.

to be executed in pursuance thereof shall be enrolled in the same court as the first bargain and sale of the same estate was enrolled."

Sect. 68. "And be it enacted, That the commissioners shall have power, by deed indented, and enrolled in any of His Majesty's courts of record, to make sale, for the benefit of the creditors, of any copyhold or customary-hold lands, or of any interest to which any bankrupt is entitled therein, and thereby to entitle or authorize any person or persons on their behalf to surrender the same for the purpose of any purchaser or purchasers being admitted thereto." (y)

Let us now consider more particularly the nature of some portions of the bankrupt's property.

Estates Tail and Base Fees.—We have just seen that by 6 G. 4. c. 16. s. 65. the commissioners had power to make sale of the bankrupt's estates tail, by deed indented and enrolled; that section is repealed by stat. 3 & 4 W. 4. cap. 74. s. 55. except as to fiats and commissions on or previous to Dec. 31, 1833. The following is a short account of the provisions of the latter statute, some of which apply also to base fees, and all which, like the provisions of 6 G. 4. c. 16., apply to the bankrupt's lands in Ireland, as well as in England.

By sect. 56. the commissioner, acting in execution of any fiat, issued since 31st Dec. 1833, is to dispose by deed for valuable consideration of lands of any tenure of which the bankrupt at the time of fiat, or between that and certificate, shall be actual tenant in tail, and thereby create as large an estate as the bankrupt, had he not become bankrupt, might have done; the effect of a protector's withholding his consent where requisite, is to be the same on the commissioner's disposition as it would have been on that of the bankrupt. (z)

(y) The observation just made respecting the power of the commissioners to convey estates tail to a purchaser, under 6 G. 4. c. 16. applies also to copyholds. Neither of these species of property passes to the assignees by their appointment.

(z) It will be seen that the bankrupt's estates tail do not pass to the assignees, but may still be disposed of by the commissioners, though in a more convenient manner than heretofore.

Section 57. empowers the commissioner to dispose by deed, to a purchaser, of any base fee to which the bankrupt is entitled in lands of any tenure, at the time of fiat, or between that and certificate, *provided there be no protector*; and thereby to create as large an estate as the bankrupt might have done if solvent.

Sect. 58. places the commissioner acting in the execution of a fiat, the bankrupt under which shall be, at the time of fiat, or between that and certificate, actual tenant in tail, or tenant in tail of a base fee, in the same situation as the bankrupt would have stood in, so far as regards the consent of the protector, if there be one; enacts that his disposition, with the consent of the protector, shall, whether a prior disposition of the lands have or have not been made, either by the commissioner without the protector's consent, or under the Bankrupt and Bankrupt Court Acts, have the same effect as the bankrupt's would have had; and applies (with the variations mentioned in the next section,) to every consent given by a protector by virtue of this section, all the previous clauses in the act as to a tenant in tail's disposition of lands not copyhold (*a*) the time, (*b*) and manner, (*c*) of giving such consent, and the enrolment (*d*) of the consent when given by a deed distinct from the deed of disposition.

Sect. 59. avoids (unless enrolled in Chancery within six calendar months after the execution thereof,) (*e*) every deed by which the commissioner disposes under this act of estates other than copyhold; requires the entry (*f*) on the Court

(*a*) Ss. 22 to 37, and s. 48.

(*b*) S. 46.

(*c*) Ss. 42 to 45, and s. 48.

(*d*) S. 46.

(*e*) By s. 69. deeds relating to Irish lands of English bankrupts are to be enrolled in the Chancery of Ireland. By s. 73. acknowledgment before enrolment is dispensed with, as to deeds executed

under this act: and by s. 74. except as to a subsequent deed for valuable consideration, first enrolled, every deed when enrolled, is to take effect as if its enrolment had not been requisite.

(*f*) It is observable that no time is fixed within which this entry must be made. See ss. 53—4.

Rolls of deeds disposing of copyholds, and of the protector's consent thereto if given by a distinct deed; and avoids such deed of consent, unless executed on or before the day of executing the deed of disposition.

By section 60. if the commissioners have by their conveyance of an estate tail in lands of any tenure, without the protector's consent, created a base fee, and afterwards, during its continuance, there cease to be a protector, it shall be enlarged in the same way as if there had been no protector when it was created.

Section 61. provides for the enlargement of an *already subsisting* base fee in the bankrupt's lands of any tenure sold or conveyed under the Bankrupt and Bankrupt Court Acts, in case there should afterwards, during its continuance, *cease to be a protector* of the settlement. (g)

Section 62. provides that a voidable estate in lands of any tenure created in favour of a purchaser, either by an actual tenant in tail becoming bankrupt, or by a tenant in tail entitled to a base fee becoming bankrupt, shall be confirmed by the disposition of the commissioners, except as against a purchaser from the commissioner for valuable consideration, and without express notice. (h)

Section 63. renders acts of a bankrupt tenant in tail, which would have been void against his assignees, if done about lands in fee simple, void as against the disposition of the commissioner under this act.

Section 64. provides for the bankrupt's retaining such powers as he would have had if he had not become bankrupt, subject to the powers of his commissioners, the estate of his assignees, and the rights of persons claiming under them.

(g) We have already seen provision made by sect. 60. for the enlargement of a base fee, created such by the commissioner's disposition of the bankrupt's estate tail, and by sect. 58. for the en-

largement of *all* base fees in case of the subsequent consent of the protector.

(h) This is analogous to the decision in Mon. & Mac. 65, concerning equitable mortgages of bankrupt tenant in tail.

Section 65. provides that the commissioner's disposition of the bankrupt's estate tail, or base fee, after his death, shall be as valid as if made in his lifetime, in the following cases:

1. If, at the time of the bankrupt's death, there was no protector.

2. If bankrupt was *actual* tenant in tail, and there be, at the time of the disposition, issue inheritable.

3. If the bankrupt was tenant in tail, entitled to a base fee; and there be, at the time of the disposition, issue, who, but for the creation of such base fee, would be actual tenant in tail, and either no protector or a protector who consents.

Section 66. gives to the commissioner's disposition, under this act, of legal estate in copyholds, the operation of a surrender.

Section 67. enacts that the rents and profits of land, whereof the commissioner has power to dispose, under this act, shall, in the meantime, be received by the assignees, who shall also have the same power of enforcing covenants, conditions, and agreements, in respect of the lands, rents, and profits, and of entry for the non-observance thereof, as the bankrupt would have had; and concludes as follows: "Provided always that this clause shall apply to all lands held by copy of court roll; but shall only apply to those lands of any other tenure, which any commissioner, acting in the execution of any such fiat as aforesaid, may have power to dispose of, under this act, after the bankrupt's decease."

Copyholds.—These, as we have seen, do not pass to the assignees on their appointment, but may be conveyed to the purchaser by the commissioner. (i) By st. 6. G. 4. c. 16. s. 69.

"Every person to whom any sale of copyhold or customary lands or tenements shall be made by the commissioners, shall, before he enter

(i) 6. G. 4. c. 16. ss. 64 & 68., ante, pp. 438 & 440.

into or take any profit of the same, agree and compound with the lords of the manors of whom the same shall be holden, for fines, dues, and other services as theretofore have been usually paid for the same, and thereupon the said lords shall, at the next or any subsequent court to be holden for the said manors, grant unto such vendee, upon request, the said copy or customary lands or tenements for such estate or interest as shall have been sold to him as aforesaid, reserving the ancient rents, customs, and services, and shall admit him tenant of the same." (k)

We have seen how the conveyance of entailed copyholds is regulated by the *Fine and Recovery Act*.

Contingent Interests.—These pass under the general words contained in 6 G. 4. c. 16.; (l) but the possibility of an heir, during the lifetime of his ancestor, does not. (m)

Advowsons.—The advowson itself may be sold for the benefit of the creditors; but if the church fall void, before the sale, the bankrupt shall present; for the law does not consider the void turn as of any pecuniary value. (n)

Offices.—Offices of inheritance, or for terms of years, are, generally speaking, saleable, excepting such as concern the administration of justice. (o) On principles of public policy, an officer in the army is not bound either to discover or surrender his half-pay. (p)

Choses in Action.—The assignees take all the bankrupt's debts by the express words of the statute 6 G. 4. c. 16. s. 63.

(k) See Co. B. L. 297.

(l) Vide Higden v. Williamson, 3 P. Wms. 132, on a similar provision in the st. of Eliz.

(m) Moth v. Frome, Amb. 304. See Carleton v. Leighton, 3 Meriv. 671.

(n) Co. B. L. 297. Exp. Meymot, 1 Atk. 200. See 6 G. 4. c. 16. sect. 77.

(o) Exp. Butler, Ambl. 73. 1 Atk.

210. Co. B. L. 298. Schelinger v. Blackerby, 1 Ves. 347. Lowfield's case, 1 Atk. 212. Bristow's case, ib. St. 5 & 6 Edw. 6. cap. 16.

(p) Cathcart v. Blackwood, Co. B. L. 299. See Barwick v. Read, 1 H. Bl. 627. Flarty v. Odium, 3 T. R. 681. Lidderdale v. D. of Montrose, 4 T. R. 248. Stone v. Lidderdale, 2 Anst. 533.

They have also, under the general words of that section, a right to sue upon beneficial contracts made with the bankrupt, and for injuries affecting his property, though not for mere personal wrongs. (*q*) Thus the assignees were held entitled to sue on the breach of a contract to deliver a quantity of stone to the bankrupt at a certain price, before his bankruptcy. (*r*) There are some cases, in which they may elect whether they will affirm a contract made with him, and sue on it, or proceed in their own right in tort; for instance, where the defendant sold the bankrupt's goods after an act of bankruptcy and with notice of it, the assignees were allowed to sue for the price as money had and received to their use; (*s*) but could also have sued in trover for the goods. And the effect of their adopting the bankrupt's contract, and proceeding on it, is to give the defendant every advantage deducible from its validity; (*t*) for it is a general rule, that the assignees cannot affirm the bankrupt's act in part, and repudiate it as to the rest. (*u*) A sheriff is liable, in trover, at the suit of the assignees, when, within two months before fiat issued, he seizes and sells, upon a *fieri facias* against a trader who has committed an act of bankruptcy of which the sheriff is wholly ignorant: (*w*) but he is not liable in trespass; for a man cannot be made a trespasser by relation. (*x*) And as the sheriff is liable, so is

(*q*) Wright *v.* Fairfield, 2 B. & Ad. 727. Hancock *v.* Caffyn, 8 Bingh. 358. Porter *v.* Vorley, 9 Bingh. 93. Whitworth *v.* Davis, 1 V. & B. 545. Sloper *v.* Fish, 2 V. & B. 145.

(*r*) Wright *v.* Fairfield.

(*s*) King *v.* Leith, 2 T. R. 141.

(*t*) Smith *v.* Hodson, 4 T. R. 211. See Waller *v.* Drakeford, 1 Starkie, 481.

(*u*) Brewer *v.* Sparrow, 7 B. & C. 310. Wilson *v.* Poulter, Str. 859.

(*w*) Balme *v.* Hutton, in Cam. Scacc.

9 Bingh. 471, reversing the decision of the Exchequer: accord. Carlile *v.* Garland, 7 Bingh. 302. This case was carried into the Exchequer Chamber, where the judges were equally divided on the subject of the sheriff's liability. Garland *v.* Carlile, 10 Bingh. 452. It is now, I understand, before the House of Lords. Dillon *v.* Langley, 2 B. & Adol. 131.

(*x*) Smith *v.* Milles, 1 T. R. 475. See the observations of Patteson, J., in Balme *v.* Hutton, 9 Bingh. 477.

the execution creditor, if a party to the conversion. (*y*) But, in this case also, the assignee has an election, and may bring money had and received for the produce of the goods. (*z*)

A right to bring a real action passes to the assignees, even when the bankrupt's claim is in right of his wife. (*a*) So does a right to recover money lost at play, under 9 Anne, c. 14. (*b*) So does his interest in a patent. (*c*) Or his right to publish a newspaper. (*d*)

As the right to bring an action at law upon the bankrupt's contract passes to his assignees, so does the right to have a specific performance decreed by equity. (*e*) St. 6. G. 4. c. 16. s. 76., in order to prevent them from abusing this right, in case of agreements for the purchase of land, has provided,

“That if any bankrupt shall have entered into any agreement for the purchase of any estate or interest in land, the vendor thereof, or any person claiming under him, if the assignees of such bankrupt shall not (upon being thereto required) elect whether they will abide by and execute such agreement, or abandon the same, shall be entitled to apply by petition to the Lord Chancellor, who may thereupon order them to deliver up the said agreement, and the possession of the premises, to the vendor or person claiming under him, or may make such other order therein as he shall think fit.”

In order to prevent the inconvenience which might be occasioned, by actions and suits abating on the death of an assignee, st. 6. G. 4. c. 16. sect. 67. enacts,

“That whenever an assignee shall die, or a new assignee or assignees shall be chosen as aforesaid, no action at law or suit in equity shall

(*y*) *Rush v. Baker*, B. N. P. 91.
Meaham v. Edmondson, 1 B. & P. 369.
 See observations of Patteson, J., on the case of *Baily v. Bunning*; on *Balme v. Hutton*, 9 Bingham. 476.

(*z*) *Kitchin v. Campbell*, 3 Wils. 304.
Young v. Marshall, 8 Bingham. 43.

(*a*) *Mitchell v. Hughes*, 6 Bingham. 695.
Smith v. Coffin, 2 H. Bl. 444.

(*b*) *Brandon v. Pate*, ib. 308.

(*c*) *Hesse v. Stevenson*, 3 B. & P. 365.

(*d*) *Longman v. Tupp*, 2 N. R. 67.

(*e*) See *Whitworth v. Davis*, 1 V. & B. 545. *Sloper v. Fish*, 2 V. & B. 145.

Brooke v. Hewitt, 3 V. 253.

be thereby abated, but the court in which any action or suit is depending may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or new assignee or assignees to be substituted in the place of the former; and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees, in the same manner as if he or they had originally commenced the same."

Foreign Property.—According to the law of England, and of almost every other country, personal property has no locality, but is subject to the law which governs the person of the owner. It follows, that, unless there be a positive law there to prevent it, the bankrupt's personal property in foreign countries passes to his assignees. (f) His real property, *if situated in the colonies*, is, we have seen, expressly given to them.

Powers.—By 6 G. 4. c. 16. sect. 77.

"All powers vested in any bankrupt which he might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice) may be executed by the assignees for the benefit of the creditors, in such manner as the bankrupt might have executed the same." (g)

Leases.—The assignees are not bound to accept a term for years belonging to the bankrupt; for it might be burdened with rent and covenants beyond its value, and prove a loss instead of a benefit to the creditors. (h) Such an estate, till they have done some act to manifest their acceptance of it, (i) remains in the bankrupt, subject to the right of the assignees

(f) See 1 H. Bl. 690. Cullen, 244.
2 Bell's Comm. 685. Hunter v. Potts,
4 T. R. 182. Sill v. Worswick, 1 H. B.
665. Phillips v. Hunter, 2 H. B. 402.
B. of Scotland v. Cuthbert, 1 Rose, 362.
Selkraig v. Davies, 2 Dow. 230

(g) Before this sect. the bankrupt was
not compellable to execute an absolute

power of appointment in favour of his
assignees. Thorpe v. Goodall, 17 Ves.
270.

(h) Bourdillon v. Dalton, 1 Esp. 233.
Peake, 238.

(i) Copeland v. Stevens, 1 B. & A.
593. Tuck v. Fyson, 6 Bingh. 330.

to adopt it. It has frequently become a question, what acts will amount to such an adoption. The general rule is, that any intermeddling with the estate, in the capacity of owner, amounts to an adoption of it; but not a mere experiment to ascertain its value. Thus, where the assignees entered and kept possession of the premises for three months, they were held to have adopted the lease, though the bankrupt's effects were on the premises during that period, and immediately after the sale they delivered up the key. (*k*) But they were held not to have adopted the term, by advertising it for sale, without stating it to belong to them, nor by or for whom it was to be sold, but only that there was a saleable term; for that might be a mere experiment to ascertain its value. (*l*)

The lease remaining in the bankrupt till the assignees' election, he would, in the meanwhile, and afterwards, in case of their refusing it, be liable to rent, (*m*) and would be chargeable on his express covenants, whether the assignees accepted the lease or declined it. (*n*) However, by st. 1. G. 4. c. 16. s. 75.,

“ A bankrupt entitled to any lease or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained; and if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid; and if the assignees shall

(*k*) *Hanson v. Stevenson*, 1 B. & A. 203. See *Hastings v. Wilson*, Holt, 290. *Welsh v. Myers*, 4 Camp. 368. *Hancock v. Welsh*, 1 Stark. 347. *Thomas v. Pemberton*, 7 Taunt. 206. *Clarke v. Hume*, 1 R. & M. 207. *Page v. Godden*, 2 Stark. 309. *Gibson v. Courthorpe*, 1 D. & R. 205.

(*l*) *Turner v. Richardson*, 7 East. 335. See *Wheeler v. Bramah*, 3 Camp. 340. *Hill v. Dobie*, 8 Taunt. 325. 1 Wms. Saunds. 241. n. p.

(*m*) *Copeland v. Stevens*, 1 B. & A. 593.

(*n*) *Auriol v. Mills*, 1 H. Bl. 433. 4 T. R. 94.

not (upon being thereto required) elect whether they will accept or decline such lease or agreement for a lease, the lessor or person so agreeing as aforesaid, or any person entitled under such lessor or person so agreeing, shall be entitled to apply by petition to the Lord Chancellor, who may order them so to elect and to deliver up such lease or agreement, in case they shall decline the same, and the possession of the premises, or may make such other order therein as he shall think fit."

This section applies only to the case of a lessee, not to that of the assignee of a lessee. (o) And though the bankrupt, complying with the provisions of the act, cannot be sued for any breach of covenant subsequent to the date of the fiat, and is discharged from his express covenants contained in the lease, although he should come in again as the assignee of his own assignees; (p) yet a surety for the performance of those covenants is liable for breaches accruing between the date of the commission and the delivery up of the lease. (q) The assignees, as they may, if they please, repudiate the lease, so, if they do, are not allowed to take advantage of any covenants contained in it. (r) If they accept it, they may, like ordinary assignees, exonerate themselves from future liability by assigning it over even to an insolvent person. (s)

Trust Property.—Property held by the bankrupt in trust for others, does not pass to his assignees; (t) since it would be in no wise available for the purpose of the bankrupt laws. By 6 G. 4. c. 16. s. 79.

"If any bankrupt shall as trustee be seised, possessed of, or entitled to, either alone or jointly, any real or personal estate, or any interest secured upon or arising out of the same, or shall have

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| (o) Manning v. Flight, 3 B. & Ad. 215. | (s) Onslow v. Corrie, 2 Madd. 330. |
| (p) Doe d. Cheere v. Smith, 7 Taunt. 595. | (t) Scott v. Surman, Willes, 402. |
| (q) Tuck v. Fyson, 6 Bingh. 321. | Carpenter v. Marnell, 3 B. & P. 40. |
| (r) Kearsey v. Carstairs, 2 B. & Ad. 726. | Gladstone v. Hadwen, 1 M. & S. 526. |
| | Exp. Gennys, 1 M. & M. 258. |

standing in his name as trustee, either alone or jointly, any government stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, it shall be lawful for the Lord Chancellor, on the petition of the person or persons entitled in possession to the receipt of the rents, issues, and profits, dividends, interest, or produce thereof, on due notice given to all other persons (if any) interested therein, to order the assignees, and all persons whose act or consent thereto is necessary, to convey, assign, or transfer the said estate, interest, stock, funds, or annuities to such person or persons as the Lord Chancellor shall think fit, upon the same trusts as the said estate, interest, stock, funds, or annuities were subject to before the bankruptcy, or such of them as shall be then subsisting and capable of taking effect; and also to receive and pay over the rents, issues, and profits, dividends, interest, or produce thereof, as the Lord Chancellor shall direct."

Stock.—By 6 G. 4. c. 16. s. 80.

"If any such bankrupt shall have any government stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, standing in his name in his own right, it shall be lawful for the commissioners, by writing under their hands, to order all persons whose act or consent is thereto necessary, to transfer the same into the name of the assignees, and to pay all dividends upon the same to such assignees; and all such persons whose act or consent is so necessary as aforesaid are hereby indemnified for all things done or permitted pursuant to such order."

Property in right of Wife.—Whatever beneficial interest the bankrupt has in his wife's property goes to his assignees.^(u) But property which she possesses as a sole trader by the custom of London,^(w) or which is settled to her separate use,^(x) does not fall within that denomination; and as the assignees take the same beneficial interest which the bank-

(u) *Mitchell v. Hughes*, 6 Bing. 696.
Caunt v. Ward, 7 Bing. 608. *Pringle v.*
Hodson, 3 Ves. 617. *Robinson v. Taylor*,
 2 Bro. C. C. 589.

(w) *Lavie v. Phillips*, Burr. 1776.
 (x) *Vandenanker v. Desborough*, 2
Vern. 96. *Bennett v. Davis*, 2 P. Wms.
 316.

rupt possessed, it follows that if the bankrupt die before they have reduced the wife's *choses in action* into possession, the wife will take those by survivorship. (*y*) If the assignees are able to come at the wife's property at law, equity will not interfere with the legal title, but if they are obliged to apply to equity for its assistance, the court will impose terms upon them, by stipulating that a provision be made for her out of the fund. (*z*) This equity is personal to her; she may, if she think fit, waive it and defeat her children, (*a*) but if she do not, it will enure for their benefit also. (*b*)

Redeemable Property.—By 6 G. 4. c. 16. s. 70.

“If any bankrupt shall have granted, conveyed, assured, or pledged any real or personal estate, or deposited any deeds, such grant, conveyance, assurance, pledge, or deposit being upon condition or power of redemption at a future day, by payment of money or otherwise, the assignees may, before the time of the performance of such condition, make tender or payment of money, or other performance, according to such condition, as fully as the bankrupt might have done, and after such tender, payment, or performance, may sell and dispose of such real or personal estate for the benefit of the creditors as aforesaid.”

Future Property.—The assignees take not merely the bankrupt's present property, but also that which may accrue to him previously to his obtaining his certificate. (*c*) He has, however, an interest in it subject to their right, and is entitled

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| (<i>y</i>) Mitford <i>v.</i> Mitford, 9 Ves. 87. | (<i>a</i>) Murray <i>v.</i> Lord Elibank, 10 Ves. |
| Hornsby <i>v.</i> Lee, 2 Madd. 16. Purdew <i>v.</i> | 88 & 91. Scriven <i>v.</i> Tapley, 2 Eden. 337. |
| Jackson, 1 Russ. 1. | Ambl. 509. Lloyd <i>v.</i> Williams, 1 Madd. |
| (<i>z</i>) Worrall <i>v.</i> Marlar, 1 Cox, 153. | 453. but see Fenner <i>v.</i> Taylor, 1 Sim. |
| Burden <i>v.</i> Dean, 2 V. jun. 607. Brown | 169. |
| <i>v.</i> Clark, 3 Ves. 166. Lumb <i>v.</i> Milnes. | (<i>b</i>) Steinmetz <i>v.</i> Halthin, 1 G. & J. |
| 5 Ves. 507. Carr <i>v.</i> Taylor, 10 Ves. 574. | 64. Rowe <i>v.</i> Jackson, 2 Dick. 604. |
| Lord Elibank <i>v.</i> Montolieu, 5 Ves. 737. | Murray <i>v.</i> Lord Elibank, <i>supra</i> . |
| Basevi <i>v.</i> Serra, 3 Meriv. 674. | (<i>c</i>) Exp. Ansell, 19 Ves. 208. See |

7 T. R. 296.

to recover it from strangers if the assignees do not interfere, (d) which they may do, even after the bankrupt has commenced an action for the property. (e) They, indeed, have no right to seize the profits of his personal and daily labour, for that would be to deprive him of the means of existence; and it was held in one case, that he might recover a compensation for such labour against his assignees, who had, themselves, employed him: (f) but a bankrupt who acts as a furniture broker, and employs men and vans, cannot be considered as merely using his personal labour in this sense. (g)

Thirdly. As to the time from which bankrupt's property vests in his assignees.

We now proceed to inquire, from what period the bankrupt's property vests in his assignees, the answer to which is, generally speaking, *from the act of bankruptcy*. The assignees have it is true no title till their appointment, but when appointed, their title extends backwards, and relates to the act of bankruptcy, avoiding the bankrupt trader's intermediate dealings.

Such is the general rule, which is, however, subject to many qualifications and exceptions, some existing independently of the bankrupt acts, and several introduced by them along with the main doctrine.

By the 81st section of 6 G. 4. c. 16. which has before been commented on, so far as it relates to securities held by the bankrupt's creditors; it is enacted,

(d) Webb v. Fox, 7 T. R. 391.
Brown v. Bullen, Doug. 407. Fowler v.
Down, 1 B. & P. 44. Kitchen v. Barch,
7 East. 53. Cumming v. Roebuck, 1
Holt. 172. Clarke v. Calvert, 3 Moore,
96. Drayton v. Dale, 2 B. & C. 293.
Hallyar v. Sherwood, 2 Nev. & Mann.
401.

(e) Crofton v. Poole, 1 B. & Adol.
570. See Hull v. Pickergill, 1 B. & B.
282. Nias v. Adamson, 3 B. & A. 225.
Hesse v. Stevenson, 1 B. & P. 565.

(f) Coles v. Barrow, 4 Taunt. 754.

(g) Crofton v. Poole, 1 B. & Ad.
570.

“ That all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt, *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, *bonâ fide* executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed: provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission, within two calendar months next after it shall have been superseded, no such conveyance, contract, dealing, or transaction, execution or attachment, shall be valid, unless made, entered into, executed, or levied more than two calendar months before the issuing the first commission.”

A voluntary transfer, which is in itself an act of bankruptcy, cannot be considered *bonâ fide*, so as to be protected by this section. (*h*) In reckoning the two months here mentioned, the courts take notice of the fraction of a day; therefore, two months were held to have elapsed between eleven o'clock, A. M., on the thirteenth of August, and the afternoon of the thirteenth of October. (*i*)

By 6 G. 4. cap. 16. sect. 82.

“ All payments really and *bonâ fide* made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor,) shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bonâ fide* made, or which shall hereafter be

(*h*) *Bevan v. Nunn*, 9 Bing. 107. (*i*) *Godson v. Sanctuary*, 4 B. & Ad. 255.

made to any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed." (*k*)

It will be observed, that *payments* by and to the bankrupt, are peculiarly favoured; the protection afforded to them by this section, reaching up to the date and issuing of the fiat. It, therefore, becomes necessary to consider what is, properly speaking, a *payment*. When A. lent the bankrupt his acceptance, and afterwards purchased four horses from him, agreeing that their price should be set off against the amount of the acceptance, this was held not to be a *payment*; (*l*) nor is the loan of a sum of money to the bankrupt upon a mortgage of his property such. (*m*) And it is to be observed that this section, though it sometimes operates so as to protect a party who has bought goods from the bankrupt and paid for them, in his possession of those goods, (*n*) does so, not on the ground that the sale was valid, but that the *payment* of the price must be protected, which can only be done by allowing the vendee to retain the goods against the assignees, till they have returned him his money. (*o*) A. having received bills and money from a bankrupt, in order to induce him to make a payment, which, if made by the bankrupt himself, would have been protected by this section; and having before fiat made the payment out of his own money,

(*k*) Vide *Craven v. Edmondson*, 6 Bingham. 738.

(*l*) *Carter v. Breton*, 6 Bingham. 617. See on the meaning of *payment*, *Wilkins v. Casey*, 7 T. R. 711. *Bishop v. Crawshay*, 3 B. & C. 415. *Copeland v. Stein*, 8 T. R. 199. *Hurst v. Gwennap*, 2 Stark. 306.

(*m*) *Cannan v. Denew*, 10 Bingham. 292.

(*n*) *Hill v. Farnell*, 9 B. & C. 45. See *Cash v. Young*, 2 B. & C. 413.

(*o*) See the observations of Tindal C. J. in *Carter v. Breton*, and in *Cannan v. Denew*, 10 Bingham. 292.

was held to be excused from delivering up the bills and money so received from the bankrupt to his assignees. (p)

By section 84.

“No person or body corporate, or public company, having in his or their possession or custody any money, goods, wares, merchandizes, or effects belonging to any bankrupt, shall be endangered by reason of the payment or delivery thereof to the bankrupt or his order; provided such person or company had not, at the time of such delivery or payment, notice that such bankrupt had committed an act of bankruptcy.”

The protection afforded by the three last recited sections, is, it will be observed, upon condition that the party protected have no *notice of the bankruptcy*. A knowledge that the trader was in embarrassed circumstances does not invalidate the transaction if *bonâ fide*. (q)

Sections 83 and 85 enact on this subject as follows:

Sect. 83. “And be it enacted, That the issuing of a commission shall be deemed notice of a prior act of bankruptcy (if an act of bankruptcy had been actually committed before the issuing the commission), if the adjudication of the person or persons against whom such commission has issued shall have been notified in the London Gazette, and the person or persons to be affected by such notice may reasonably be presumed to have seen the same.”

Sect. 85. “And be it enacted, That if any accredited agent of any body corporate or public company shall have had notice of any act of bankruptcy, such body corporate or company shall be hereby deemed to have had such notice.”

The following section protects, even in a case where the party protected had, at the time of his dealing with the bankrupt, notice of an act of bankruptcy.

Sect. 86. “And be it enacted, That no purchase from any bankrupt *bonâ fide* and for valuable consideration, where the purchaser

(p) *Shaw v. Batley*, 4 B. & Adol. 805. Vide *Tope v. Hockin* 7 B. & C. 111.
(q) *Tucker v. Barrow*, 1 M. & M. 137. See *Spratt v. Hobhouse*, 4 Bingh. 182.

had notice at the time of such purchase of an act of bankrupt by such bankrupt committed, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months after such act of bankruptcy."

Where none of these statutory exceptions apply, the assignees take, by relation to the act of bankruptcy, subject to the following qualifications.

First. Such relation must not be carried further back than the time when the petitioning creditor's debt accrued; for if the act of bankruptcy were before that period, the fiat must have issued wrongfully, and they themselves could have no right as assignees. (r)

Secondly. The doctrine of relation is, as we have before seen, unavailable against the King's prerogative. (s)

Thirdly. As it is no defence to an action at law, to say that the plaintiff has committed an act of bankruptcy, payments which the bankrupt has enforced by coercion of law after an act of bankruptcy, are, to prevent the glaring injustice that would otherwise follow, valid against the assignees. (t)

Where one member of a firm has become bankrupt, he cannot afterwards transfer the partnership effects, or pay partnership debts out of the joint funds to a creditor with notice of his bankruptcy. (u) But a creditor of the firm who is paid, fairly, and without contemplation of bankruptcy, by the solvent partner, after the bankruptcy of another, has a good defence *at law*; (w) though from the decisions in equity on cases where execution has been levied on the partnership effects,

(r) *Exp. Birkett*, 2 Rose, 71. *Exp. Bowness*, 2 M. & S. 479. 7 B. & C. 101.

(s) See 1 East, 367. 7 Vin. Ab. 108.

(t) *Foster v. Allanson*, 2 T. R. 479. *Fuller v. Gibson*, 2 Cox, 24. *Prickett v. Down*, 3 Camp. 131. See *Windham v. Paterson*, 1 Stark. 147. *Spratt v. Hobhouse*, 4 Bingh. 179. *Cox v. Morgan*, 2 B. & P. 398.

(u) *Thomason v. Frere*, 10 East. 418.

Craven v. Edmondson, 6 Bingh. 737.

Burt v. Moulton, 3 Tyrwh. 564.

(w) *Woodbridge v. Swann*, 4 B. & Ad. 636. *Harvey v. Crickett*, 5 M. & S. 336. *Smith v. Oriel*, 1 East. 363. *Fox v. Hanbury*, Cowp. 445. See *De Tastet v. Carroll*, 1 Stark. 85.

under such circumstances (x) it may be doubted how far such a transaction would be there upheld.

What property other than the bankrupt's passes to his assignees.

Not only all the property to which the bankrupt has a right is applicable towards the payment of his creditors, but there are instances, in which, effects that could not have been retained by the bankrupt himself, had he continued solvent, vest in his assignees upon his bankruptcy. By 6 G. 4. c. 16. s. 73. it is enacted,

“ That if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration), have conveyed, assigned, or transferred to any of his children, or any other person, any hereditaments, offices, fees, annuities, leases, goods, or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person or persons, or into any other person's name, the commissioners shall have power to sell and dispose of the same as aforesaid; and every such sale shall be valid against the bankrupt, and such children and persons as aforesaid, and against all persons claiming under him.”

But the principal enactment on this subject is contained in 6 G. 4. c. 16. s. 72. which strikes at the mischief that might be occasioned by allowing the use of other person's property to be granted with impunity, to a failing trader, who would thereby be enabled to assume a deceitful appearance of wealth, and obtain a factitious credit in the world; the enactment is as follows :

Sect. 72. “ And be it enacted, That if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same for the

(x) In re Wait, 1 Jac. & Wal. 605. Dutton v. Morrison, 17 Ves. 493. See Brickwood v. Miller, 3 Meriv. 279.

benefit of the creditors under the commission : Provided, that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of an act of Parliament made in the fourth year of his present Majesty, intituled *An Act for the registering of Vessels.* (y)

It will be observed, that the operation of this section is confined to cases in which there is a reputed ownership of *goods and chattels*. Such are, ships, (z) furniture, (a) utensils in trade, (b) (unless such utensils are let in conformity to an usage of trade), (c) stock, (d) bills of exchange, (e) policies of insurance, (f) shares in a public company, (g) and in a newspaper. (h) But chattel interests in real property, fixtures, or shares in a company seised of real estate, are not within these words. (i)

The goods must be *in the possession of the bankrupt, with the consent of the true owner*; (j) the property of infants, who cannot consent, is therefore not within this clause; (k) and such consent, together with *the possession* of the trader, must continue

(y) 4 G. 1. c. 41. is repealed; but see now 3 & 4 W. 4. c. 55. s. 43.

(z) Stephens v. Sole cited, 1 Ves. 352. Exp. Barn, 1 Jac. & W. 378.

(a) Lingham v. Biggs, 1 B. & P. 82.

(b) Lingard v. Messiter, 1 B. & C. 308. Sinclair v. Stevenson, 2 Bingh. 524. Trappes v. Harter, 3 Tyrwh. 603. See Coombs v. Beaumont, 2 Nev. & Mann, 238. 5 B. & Ad. 75.

(c) Horn v. Baker, 9 East. 215. 239. See Bryson v. Wylie, 1 B. & P. 83. Storer v. Hunter, 3 B. & C. 368.

(d) Exp. Richardson, Buck. 480.

(e) Hornblower v. Proud, 2 B. & A. 327.

(f) Falkener v. Case, 3 Bro. C. C. 125.

(g) Nelson v. London, A. C. 2 S. & S. 292.

(h) Longman v. Tripp, 2 N. R. 67.

(i) Ryal v. Roll, 1 Atk. 165. Horn v. Baker, 9 East. 215. Exp. Vauxhall Bridge Co. 1 G. & J. 101. Clark v. Crownshaw, 3 B. & Adol. 808. Hubbard, v. Bagshaw, 4 Simons, 326. Trappes v. Harter, 3 Tyrwh. 603. Coombs v. Beaumont, 2 Nev. & Mann, 238. 5 B. & Adol. 75. where Parke, J. says he never knew any distinction made between such fixtures as would be removable between landlord and tenant and such as would not. See also Boydell v. M'Michael, 3 Tyrwh. 974.

(j) Exp. Richardson, Buck. 480. Exp. Dale, Buck. 565.

(k) Viner v. Cadell, 3 Esp. 88.

up to the time *when he becomes bankrupt.* (l) Goods which come into his possession between the act of bankruptcy and fiat, are therefore not within this section, (m) nor goods which were taken out of his possession the day before he became bankrupt. (n) But it has been said that the removal of them out of his custody upon the *day*, but previous to the act of bankruptcy, would be insufficient. (o)

The principal difficulty in deciding questions on this clause is that of ascertaining whether the bankrupt was or was not *reputed owner*; and this is a question of fact proper for the consideration of a jury, nor is it easy to lay down rules for its solution. Where the bankrupt has once been the real owner of the property in question, the mere fact of possession may raise a presumption that he continues in possession as reputed owner. But where the bankrupt has never been the real owner, possession may not, of itself, show him to be reputed owner; some additional evidence may be requisite for that purpose: (p) a servant's possession of goods has been held that of his master, for the purposes of this clause, (q) and a carrier's that of his employer. (r) But the pawnee's is not that of the pawnor. (s) Where the purchaser transferred his purchase to a particular bin in the vendor's cellar, sealed it, and had an entry made in the vendor's books, the statute was held not to apply; (t) but it was otherwise where he only marked the goods with his initials. (u) A symbolical delivery will be sufficient to take

(l) *Smith v. Topping*, 2 Nev. & Mann, 421. *Jones v. Dwyer*, 15 East. 21. *Exp. Smith*, Buck. 149. 3 Madd. 63.

(m) *Lyon v. Weldon*, 2 Bingham. 384.

(n) *Arbouin v. Williams*, R. & M. 72. but see *Darby v. Smith*, 8 T. R. 82. 15 East. 26.

(o) *Arbouin v. Williams*.

(p) *Lingard v. Messiter*, 1 B. & C. 308.

(q) *Jackson v. Irwin*, 2 Camp. 48. *Toussaint v. Hartop*, Holt. 335.

(r) *Hervey v. Liddiard*, 1 Star. 123.

(s) *Guening v. Clark*, 4 B. & C. 316.

(t) *Exp. Marrable*, 1 G. & J. 402. *Carruthers v. Payne*, 5 Bingham. 270.

(u) *Knowles v. Horsefall*, 5 B. & A. 134. *Lingard v. Messiter*, 1 B. & C. 308.

the case out of this clause, if from the nature of the goods no other can be made. (*w*) The usage of trade is sometimes of importance, and if the bankrupt's possession of another person's goods be consistent with such usage, they may be exempted from the operation of this clause, under circumstances which otherwise would have brought them within it. (*x*) Where a debt is assigned, notice of the transfer should be given to the debtor, in order to prevent it from remaining in the ordering and disposition of the original creditor, and the security, if any, delivered up to the assignee. (*y*) Our limits will not permit a farther account of the decisions, each of which depends mainly on its own peculiar circumstances. (*z*)

Several exceptions from the general scope of this enactment have been established. *First*, where the property of a testator or intestate is in the possession of the bankrupt or his wife, *in auter droit*. (*a*)

Secondly, where he held the property as *factor*. (*b*) In such case, if he had sold the goods, and received the proceeds in cash, before his bankruptcy, the employer must prove like other creditors; (*c*) but it is otherwise where he had not received the proceeds, (*d*) or had taken notes or other goods in payment. (*e*)

(*w*) *Manton v. Moore*, 7 T. R. 67. *Mair v. Glennie*, 4 M. & S. 240.

(*x*) See *Storer v. Hunter*, 3 B. & C. 376. *Thackthwaite v. Cock*, 3 Taunt. 487. *Horn v. Baker*, 9 East. 215. 239.

(*y*) See *Jones v. Gibbons*, 9 Ves. 410. *Dean v. James*, 1 Nev. & Mann. 392.

(*z*) See for instances in which the statute was held to apply, *Fox v. Fisher*, 3 B. & A. 135. *Bryson v. Wylie*, 1 B. & P. 83. *Hickenbotham v. Groves*, 2 C. & P. 492. *Livesay v. Hood*, 2 Camp. 83. *Mace v. Cadell*, Cowp. 232. *Exp. Enderby*, 2 B. & C. 389. 406.

For instances in which it was held not

to apply, *Lucas v. Dorrein*, 1 B. M. 29. *Exp. Martin*, 2 Rose, 331. *Earl of Shafts. v. Russell*, 1 B. & C. 666. *Muller v. Moss*, 1 M. & S. 335. *Bedford v. Pickering*, 3 C. & P. 90. *Gibson v. Bray*, 8 Taunt. 76.

(*a*) *Exp. Ellis*, 1 Atk. 101. *Viner v. Cadell*, 3 Esp. 88. See 3 Burr, 1369. 3 M. & S. 578.

(*b*) B. N. P. 42, Cowp. 233.

(*c*) *Scott v. Surman*, Willes, 400.

(*d*) *Ibid.*

(*e*) *Whitcomb v. Jacob*, 1 Salk. 160. See *Taylor v. Plumer*, 3 M. & S. 562.

Thirdly, where the bankrupt held the property as a trustee. (*f*)

Fourthly, where it was in his hands for a particular purpose. (*g*) Thus bills deposited with a banker by his customer *for the purpose of obtaining payment*, and entered short, do not pass to the assignees of the banker on his becoming bankrupt. (*h*) But even where the bills are entered short, yet, if it appear that they were considered as cash, they pass to the assignees. (*i*)

The different species of property which become vested in the assignees for the benefit of the creditors are now enumerated. It remains to specify some enactments, clothing them with powers useful towards the realization of that property, and pointing out the mode in which their title is to be evidenced.

Right of Assignees to sue, compound, or submit to Arbitration.

By 6 G. 4. c. 16. s. 88.

“The assignees, with the consent of the major part in value of creditors who shall have proved under the commission, present at any meeting, whereof and of the purport whereof twenty-one day’s notice shall have been given in the London Gazette, may compound with any debtor to the bankrupt’s estate, and take any reasonable part of the debt in discharge of the whole, or may give time or take security for the payment of such debt, or may submit any dispute between such assignees and any persons, concerning any matter relating to such bankrupt’s estate, to the determination of arbitrators to be chosen by the assignees and the major part in value of such

(*f*) *Winch v. Keeley*, 1 T. R. 619.
Smith v. Pickering, Peake, 50. *Taylor v. Plumer*, 3 M. & S. 576. See *Caunt v. Ward*, 7 Bingh. 616.

(*g*) *Tooke v. Hollingworth*, 5 T. R. 215. 2 H. Bl. 501. *Moore v. Barthrop*, 1 B. & C. 5. *Toovey v. Milne*, 2 B. & A. 683. *Collins v. Forbes*, 3 T. R. 316. *R. v. Eggington*, 1 T. R. 370.

(*h*) *Giles v. Perkins*, 9 East, 12. *Exp. Serjeant*, 1 Rose, 153. See *Thompson v. Giles*, 2 B. & C. 422. *Exp. Armistead*, 2 G. & J. 371.

(*i*) *Exp. Thompson*, M. & M. 102. See *Carstairs v. Bates*, 3 Camp. 301. *Hornblower v. Proud*, 2 B. & A. 327.

creditors, and the party with whom they shall have such dispute, and the award of such arbitrators shall be binding on all the creditors; and the assignees are hereby indemnified for what they shall do according to the directions aforesaid, and no suit in equity shall be commenced by the assignees without such consent as aforesaid; provided that if one-third in value or upwards of such creditors shall not attend at any such meeting (whereof such notice shall have been given as aforesaid), the assignees shall have power, with the consent of the commissioners testified in writing under their hands, to do any of the matters aforesaid,"

By 1 & 2 W. 4. c. 56. s. 43.

"If the assignees of any bankrupt's estate shall agree to refer any matter in dispute with any party to arbitration, in such manner as by law they are empowered to do, such agreement of reference may be made a rule of the Court of Bankruptcy by this act constituted, and thereupon all such rights and remedies, duties and liabilities, shall accrue from such reference so made a rule of the said court, in respect of arbitration and award, and nonperformance of such award, and otherwise howsoever, as by law *at present* accrue upon any submission of reference made a rule of any of His Majesty's other Courts of Record."

By stat. 6 G. 4. c. 16. s. 89.

"In any commission against any one or more member or members of a firm, the Lord Chancellor may, upon petition, authorize the assignees to commence or prosecute any action at law, or suit in equity, in the names of such assignees and of the remaining partner or partners, against any debtor of the partnership, and may obtain such judgment, decree, or order therein, as if such action or suit had been instituted with the consent of such partner or partners; and if such partner or partners shall execute any release of the debt or demand for which such action or suit is instituted, such release shall be void; provided that every such partner, if no benefit is claimed by him by virtue of the said proceedings, shall be indemnified against the payment of any costs in respect of such action or suit; and that it shall be lawful for the Lord Chancellor, upon the petition of such partner, to direct that he may receive so much of the proceeds of such action or suit as the Lord Chancellor shall think fit."

Title of the Assignees, how evidenced.

It was formerly necessary, in most (*j*) actions or suits in which the title of the assignees became material, to establish it by proof of five requisites, viz. the commission, petitioning creditor's debt, trading, act of bankruptcy, and assignment. (*k*) For the title of the assignees depends on the authority of the commissioners, which authority, itself, takes root, not in the fiat, but in the bankruptcy; and as the adjudication is an *ex parte* proceeding, it would be contrary to the first principles of justice, that it should be conclusive on those who had no opportunity of disputing it.

However, the right of questioning the bankruptcy and putting the assignees on strict proof of their title, having been often grossly abused by debtors to the estate, who offered an unconscientious resistance to just claims, for the mere purpose of delay or experiment; the legislature, considering, that, though it would be unjust to make adjudication *conclusive in the first instance*; yet, there would be no injustice in making it conclusive upon persons who should have neglected to dispute it, after having a fair opportunity of doing so, has enacted the regulations about to be cited, for the purpose of diminishing the evil arising from vexatious resistance, by facilitating the proof of bankruptcy, and limiting the right to dispute the adjudication.

For this purpose, stat. 1 & 2 W. 4. c. 56. s. 17. after pointing out the mode in which the bankrupt may dispute the adjudication, by presenting a petition to the Court of Review, within two months from its date, if in the United Kingdom, three months, if elsewhere in Europe, or one year if out of

(*j*) For there are exceptions independent of statute, in cases where the party calling for the proof, has expressly or impliedly admitted the assignees' title. Eden, 354. Maltby v. Christie, 1 Esp. 340. Watson v. Wace, 5 B. & C. 153. Rankin v. Horner, 16 East. 191. Dick-

enson v. Coward, 1 B. & A. 677. Pope v. Monk, 2 C. & P. 112. Ledbetter v. Salt, 4 Bingh. 597.

(*k*) For which the appointment is now substituted, see ante, 346. as to the mode of proving it, see ante, 437.

Europe, or within such other time as the court shall allow, not exceeding one year, and obtaining the decision of the court or the direction of an *issue*, proceeds to enact, that if the verdict on such issue shall not be set aside on application to the Court of Review, within one month after the said trial, or if the adjudication be not set aside by the Court of Review on the petition aforesaid; such verdict, or such adjudication, shall, in all cases, as against the bankrupt, petitioning creditor, as against any assignee, to be chosen of the bankrupt's estate; all persons claiming under the said assignees, and all persons indebted to the bankrupt's estate, be conclusive evidence, that the party was or was not a bankrupt at the date of such adjudication.

Similar views dictated the following provisions of 6 G. 4. c. 16.

Sect 90. "And be it enacted, That in any action by or against any assignee, or in any action against any commissioner or person acting under the warrant of the commissioners, for any thing done as such commissioner, or under such warrant, no proof shall be required at the trial of the petitioning creditor's debt or debts, or of the trading or act or acts of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and if plaintiff, before issue joined, give notice in writing (*l*) to such assignee, commissioner, or other person, that he intends to dispute some and which of such matters; and in case such notice shall have been given, if such assignee, commissioner, or other person shall prove the matter so disputed, or the other party admit the same, the

(*l*) Notice to dispute *the bankruptcy* is too general, it must specify which of the three matters is to be questioned. Trimley v. Unwin, 6 B. & C. 537. No objection can be founded on the insufficiency of any one of them notice of an intention to dispute which, is not given, even although the opposite party himself produce the evidence, whence such objection is deducible. M'Beath v. Coates, 12 B. Moore, 122. misreported 1 Bingh. 34. Bevan v. Lewis, 1 Simons, 376. The

notice must be proved in order to put the assignees on proof of the above requisites. Decharmy v. Lane, 2 Camp. 323. In addition to the above enactment, Reg. Gen. Hil. T. 1834, directs that, "in action by or against assignees of a bankrupt, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue unless specially denied."

judge before whom the cause shall be tried may (if he thinks fit) grant a certificate of such proof or admission; and such assignee, commissioner, or other person shall be entitled to the costs to be taxed by the proper officer occasioned by such notice, and such costs shall, if such assignee, commissioner, or other person shall obtain a verdict, be added to the costs; and if the other party shall obtain a verdict, shall be deducted from the costs which such other party would otherwise be entitled to receive from such assignee, commissioner, or other person."

Sect. 91. "And be it enacted, that in all suits in equity by or against the assignees no proof shall be required at the hearing of the petitioning creditor's debt or debts, or of the trading or act or acts of bankruptcy respectively, as against any of the parties in such suit, except such parties as shall, within ten days after rejoinder, give notice in writing to the assignees of his or their intention to dispute some and which of such matters; and where such notice shall have been given, if the assignee shall prove the matter so disputed, the costs occasioned by such notice to be taxed by the proper officer shall, if the court see fit, be paid by the party or parties so giving such notice as aforesaid, and the service of such notice may be proved by affidavit upon hearing of the cause."

Sect. 92. "And be it enacted, that if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if he was out of the United Kingdom) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of or previous to the adjudication of the petitioning creditor's debt or debts, and of the trading and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions at law, or suits in equity, brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit." (m)

(m) The object of the several enactments just cited, is to dispense in certain cases with any proof whatever; the object of this, is, to *facilitate* proof where it is required; by making the depositions conclusive evidence. See *Erith v.*

Schroeder, 1 M. & M. 26. But, in order that they may be conclusive evidence of a fact, that fact must clearly appear on the face of them. Thus they will not be sufficient evidence of a debt from the bankrupt as drawer of a bill, unless they

A further provision for the admission of documentary evidence of the petitioning creditor's debt, trading, or act of bankruptcy, in case of the death of witnesses thereto, is made by the 7th section of stat. 2 & 3 W. 4. c. 114, which shall immediately be set out at large. Let us first, however, make one or two observations, on a subject intimately connected with the enactments of which we have been treating.

Provisions in favour of Bankrupts' Debtors.—We have seen that, by the ninety-second section of the Bankrupt Act, the depositions become conclusive upon debtors to the bankrupt's estate, if the bankrupt have not, within a certain period, given notice of his intention to dispute his *fiat*. But as it would be hard upon the debtors, if they were, in the mean time, to be exposed to demands by the assignees to which they probably would have no defence, although it would be unsafe to comply with them, on account of the bankrupt's right to question the title of those functionaries and the validity of payments made to them; and equally hard to leave them open to proceedings at the suit of the bankrupt, after the time at which the depositions had become conclusive between them and the assignees; their interests are provided for by the following enactments of 6 G. 4. c. 16.

Section 93. “ And be it enacted, That if the assignees commence

shew a presentment to the acceptor. *Cooper v. Machin*, 1 Bingham 426. See *Lawson v. Robinson*, 1 Stark. 456. *Marsh v. Meager*, 1 Stark. 353. But it has been held, that, where the petitioning creditor's debt is proved by the deposition, the defendant cannot shew that it was a fraudulent contrivance between the bankrupt and petitioning creditor. *Young v. Timmins*, 1 Cr. & J. 148. 1 Tyrwh. 15. The depositions are made

evidence only in proceedings by the bankrupt's own assignees for debts or demands, for which the bankrupt might have sued; that is, for which he might have sued if he had not become bankrupt, ex. gr. for a conversion after the act of bankruptcy. *Fox v. Mahoney*, 2 Cr. & Jerv. 325. 2 Tyrwh. 185. See *Jones v. Fort*, 1 M. & M. 196. and see *Muskett v. Drummond*, 10 B. & C. 153. *Scaife v. Howard*, 2 B. & C. 360.

any action or suit for any money so due to the bankrupt before the time allowed as aforesaid for him to dispute the commission shall have elapsed, any defendant in any such action or suit shall be entitled, after notice given to the assignees to pay the same, or any part thereof, into the court in which such action or suit is brought, and all proceedings with respect to the money so paid into court shall thereupon be stayed, and after the time aforesaid shall have elapsed the assignees shall have the same paid to them out of court."

Sect. 94. "And be it enacted, That all persons from whom the assignees shall have recovered any real or personal estate either by judgment or decree, are hereby discharged, in case the commission be afterwards superseded, from all demands which may thereafter be made in respect of the same by the person or persons against whom such commission issued, and all persons claiming under him or them; and all persons who shall without action or suit *bonâ fide* deliver up possession of any real or personal estate to the assignees, or pay any debt claimed by them, are hereby discharged from all claim of any such person or persons as aforesaid in respect of the same, or any person claiming under him or them; provided such notice to try the validity of the commission had not been given, and been proceeded in within the time and in manner aforesaid."

The above enactments principally tend to facilitate proof of the petitioning creditor's debt, the trading, and the act of bankruptcy. But it is also frequently necessary to establish the title of the assignees, by proof of their appointment, and of the fiat, from which the jurisdiction of their appointors is derived. This, therefore, seems the proper moment to enquire respecting the custody and use, in evidence, of these and of other documents relating to the bankruptcy; as, for instance, the depositions.

The entry, custody, and production in evidence, of proceedings in bankruptcy were formerly regulated by the following sections of 6 G. 4. cap. 16.

Sect. 95. "And be it enacted, That all things done pursuant to the act passed in the fifth year of King *George* the Second, and hereby repealed, whereby it was enacted, that the Lord Chancellor should appoint a place where all matters relating to commissions of

bankruptcy should be entered of record, and should appoint a person to have the custody thereof, be hereby confirmed; and the Lord Chancellor shall be at liberty from time to time, by writing under his hand, to appoint a proper person, who shall by himself or his deputy (to be approved by the said Lord Chancellor) enter of record all matters relating to commissions, and have the custody of the entries thereof; and the person so to be appointed, and his deputy, shall continue in their respective offices so long as they shall respectively behave themselves well, and shall not be removed, except by order in writing under the hand of the Lord Chancellor on sufficient cause therein specified."

Sect. 96. "And be it enacted, That in all commissions issued after this act shall have taken effect, no commission of bankruptcy, adjudication of bankruptcy by the commissioners, or assignment of the personal estate of the bankrupt, or certificate of conformity, shall be received as evidence in any court of law or equity, unless the same shall have been first so entered of record as aforesaid; and the person so appointed to enter matters of record as aforesaid, shall be entitled to receive for such entry of every such commission, adjudication of bankruptcy, assignment, or order for vacating the same respectively, having the certificate of such entry indorsed thereon respectively, the fee of two shillings each, and for the entry of every certificate of conformity, having the like certificate indorsed thereon, six shillings; and every such instrument shall be so entered of record upon the application of, or on behalf of any party interested therein, and on payment of the several fees aforesaid, without any petition in writing presented for that purpose; and the Lord Chancellor may, upon petition, direct any depositions, proceedings, or other matter relating to commissions of bankruptcy, to be entered of record as aforesaid, and also appoint such fee and reward for the labour therein of the person so appointed as aforesaid, as the Lord Chancellor shall think reasonable; and all persons shall be at liberty to search for any of the matters so entered of record as aforesaid: Provided that on the production in evidence of any instrument so directed to be entered of record, having the certificate thereon, purporting to be signed by the person so appointed to enter the same, or by his deputy, the same shall, without any proof of such signature, be received as evidence of such instrument having been so entered of record as aforesaid."

Sect. 97. "And be it enacted, That in every action, suit, or issue,

office copies of any original instrument or writing, filed in the office or officially in the possession of the Lord Chancellor's secretary of bankrupts, shall be evidence to be received of every such original instrument or writing respectively; and if any such original instrument or writing shall be produced on any trial, the costs of producing the same shall not be allowed on taxation, unless it appears that the production of such original instrument or other writing was necessary."

The thirteenth section of the Bankrupt Court Act directs, that every fiat, *prosecuted in the Court of Bankruptcy*, shall be filed and entered of record *in the said Court*. At length, by st. 2 & 3 W. 4. cap. 114., reciting the above enactments of 6 G. 4. c. 16. and 1 & 2 W. 4. c. 56., and the expediency of having all matters in bankruptcy under the same custody, the following provisions were introduced:

"That the records of all commissions of bankrupt, and of all proceedings under the same, which may have been heretofore entered of record pursuant to or under colour of the said first-recited act or any other act, shall be removed into the said Court of Bankruptcy, and shall be kept as records of the said court in such place as the judges of the said court shall from time to time direct; and that it shall and may be lawful for the judges of the Court of Bankruptcy to nominate the person heretofore appointed by the Lord Chancellor to enter such proceedings of record, or, in case of his refusal to accept such office, some other fit and proper person, as the clerk of enrolment to the said court, at such salary, to be paid out of the fees herein-after mentioned, as the Lord Chancellor shall by writing under his hand direct; and that such clerk of the enrolments and his successors (to be appointed in like manner, at the like salary,) shall have the care and custody of all the said records so removed as aforesaid, and shall in like manner enter of record all matters and proceedings in bankruptcy which by this act or by the said recited acts, or by any order made in pursuance thereof, are or may be directed to be entered of record, upon payment of the fees herein-after mentioned."

Sect. 2. "Provided always, and be it declared and enacted, That all commissions of bankruptcy issued before the first day of September one thousand eight hundred and twenty-five, and all depositions and other proceedings relating to such commissions, directed to be inrolled,

and actually entered of record upon or since that day, shall be deemed and taken to have been well and effectually entered of record."

Sect. 3. " Provided nevertheless, and be it further enacted, That the certificate of such entry, purporting to be signed by the person appointed to enter such proceedings, or by his deputy, shall have the same effect as if such commission had been issued after the said first day of *September* one thousand eight hundred and twenty-five, and shall be received in evidence without proof of the appointment or handwriting of such person."

Sect. 4. " And be it enacted, That any one of the judges of the Court of Bankruptcy shall have full power and authority, upon application made to him for that purpose, to direct such officer to enter upon the records of the court any commission of bankrupt at any time heretofore issued, and the depositions and proceedings had and taken under the same, or such part or parts thereof as such judge shall think fit: Provided always, that it shall and may be lawful for such officer to enter of record the several matters directed by the said recited acts or either of them to be entered of record, upon the application of or on behalf of any party interested therein, without any special order for that purpose."

Sect. 5. " And be it further enacted, that all fiats already issued or hereafter to be issued in lieu of commissions of bankrupt to be prosecuted elsewhere than in the said Court of Bankruptcy, and all adjudications of bankruptcy by the persons named in such fiats to act as commissioners, and all appointments of assignees, and certificates of conformity, made and allowed under such fiats, may and shall be entered of record in the said court of bankruptcy, upon the application of or on behalf of any party interested therein, on the payment of the fees hereafter mentioned, without any petition in writing presented for that purpose; and that any one of the judges of the said court may, upon petition, direct any deposition or other proceeding under such fiat to be entered of record as aforesaid."

Section 6. relates to the amount of fees payable for entries.

Sect. 7. " And be it further enacted, That in the event of the death of any of the witnesses deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any commission or fiat already issued or hereafter to be issued, it shall be lawful for the assignees appointed under such commission or fiat, and for all persons claiming through or under them, or acting by or under their

authority, in the cases hereafter mentioned, to produce and read in evidence, in all courts of civil judicature, and in all civil proceedings, in maintenance and support of such commission or fiat, any deposition of such deceased witness relating to such petitioning creditor's debt, trading, or act of bankruptcy, which shall have been duly entered of record pursuant to the provisions of the said recited acts or of this act; and the production or reading of such depositions, or of any copy thereof, duly authenticated according to the provisions of the said recited acts or of this act, shall have the same effect as if the matters alleged therein had been deposed to by the same witness in such court according to the ordinary course and practice thereof: provided always, that the before-mentioned depositions shall be read in evidence in such cases only where the party using the same shall claim, maintain, or defend some right, title, interest, claim or demand which the bankrupt might have claimed, maintained, or defended in case no commission of bankrupt or fiat had issued, and shall not be read in evidence in any action or proceeding now pending by which the validity of any commission or fiat is or may be brought into question."

Sect. 8. "And be it further enacted, that no fiat issued or to be issued in lieu of a commission of bankrupt, whether prosecuted in the Court of Bankruptcy or elsewhere, nor any adjudication of bankruptcy or appointment of assignees, or certificate of conformity under such fiat, shall be received in evidence in any court of law or equity, unless the same shall have been first entered of record in the Court of Bankruptcy as aforesaid."

Sect. 9. "Provided always, and be it further enacted, That upon the production in evidence of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceedings in bankruptcy, purporting to be sealed with the seal of the said Court of Bankruptcy, or of any writing purporting to be a copy of any such document, and purporting to be sealed as aforesaid, the same shall be received as evidence of such documents respectively, and of the same having been so entered of record as aforesaid, without any further proof thereof: provided nevertheless, that all fiats, and proceedings under the same, which may have been entered of record before the passing of this act, shall and may, upon the production thereof, with the certificate thereon, purporting to be signed by the person so appointed to enter proceedings in bankruptcy, or by his deputy, be received as evidence of the same

having been duly entered of record, any thing herein contained notwithstanding."

Exemption from Stamp Duty.—By 6. G. 4. c. 16. s. 98. instruments relating to the estate and effects of the bankrupt, are exempted from stamp duty, and sales of his property from auction duty.

Dividend and Audit.

Pursuing our account of the course of proceedings on a bankruptcy, and having touched upon the office, rights, duties, and privileges of the assignees, we come to the mode of distributing the bankrupt's effects, when realized by those functionaries, among the creditors who have proved their debts. Stat. 6 G. 4. c. 16. regulates this subject as follows :

Sect. 106. " And be it enacted, That the commissioners shall, at the meeting appointed for the last examination of the bankrupt, appoint a public meeting, not sooner than four calendar months from the issuing of the commission, nor later than six calendar months from the last examination of the bankrupt, whereof, and of the purport whereof, they shall give twenty-one days notice in the London Gazette, to audit the accounts of the assignees ; and the assignees at such meeting shall deliver upon oath a true statement in writing of all money received by them respectively, and when and on what account, and how the same have been employed ; and the commissioners shall examine such statement, and compare the receipts with the payments, and ascertain what balances have been from time to time in the hands of such assignees respectively, and shall inquire whether any sum appearing to be in their hands ought to be retained ; and it shall be lawful for the said commissioners to examine the said assignees upon oath, touching the truth of such accounts, and in such accounts the said assignees shall be allowed to retain all such money as they shall have expended in suing out and prosecuting such commission, and all other just allowances." (n)

(n) By 1 & 2 W. 4. c. 56. s. 47. no fee is payable on any audit meeting, unless there appear to the commissioners to be sufficient assets of the bankrupt's estate for payment thereof.

Sect. 107. " And be it enacted, that the commissioners shall, not sooner than four nor later than twelve calendar months from the issuing the commission, appoint a public meeting (whereof and of the purport whereof they shall give twenty-one days notice in the London Gazette), to make a dividend of the bankrupt's estate, at which meeting all creditors who have not proved their debts shall be entitled to prove the same; and the said commissioners at such meeting shall order such part of the net produce of the bankrupt's estate in the hands of the assignees, as they shall think fit, to be forthwith divided amongst such creditors as have proved debts under the commission, in proportion to their respective debts, and shall make an order (o) for a dividend in writing under their hands, and shall cause one part of such order to be filed amongst the proceedings under the commission, and shall deliver another part thereof to the assignees, which order shall contain an account of the time and place of making such order, of the amount of the debts proved, of the money remaining in the hands of the assignees to be divided, of how much in the pound is then ordered to be paid to every creditor, and of the money allowed by the commissioners to be retained by the assignees, with their reasons for allowing the same to be so retained; and the assignees, in pursuance of such order, (and without any deed of distribution made for that purpose,) shall forthwith make such dividend, and shall take receipts in a book to be kept for that purpose, from each creditor, for the dividend received by such creditor; and such order and receipt shall be a discharge to every such assignee for so much as he shall pay pursuant to such order; and no dividend shall be declared, unless the accounts of the assignees shall have been first so audited as aforesaid, and such statement delivered by them upon oath as aforesaid.

Where claims have been entered, they are considered proofs in calculating the dividend, and a dividend is reserved for them; but at the second or final dividend, they are struck out if not substantiated. When a creditor proves his debt after a dividend, the practice is, first to pay him equally with those

(o) This order operates as a separation of the sum ordered to be divided from the bulk of the estate, and if a creditor neg-

lect to apply for his share at the time appointed for payment, it remains at his own risk. Exp. Powel, Mon. & Mac. 283.

who proved before, and then direct a general distribution of the residue. (*p*)

The following are the provisions for a second or final dividend.

Sect. 109. " And be it enacted, That if the bankrupt's estate shall not have been wholly divided upon the first dividend, the commissioners shall, within eighteen calendar months after the issuing of the commission, appoint a public meeting (whereof and of the purport whereof they shall give twenty-one days notice in the London Gazette), to make a second dividend of the bankrupt's estate, when all creditors who have not proved their debts may prove the same; and the commissioners at such meeting, after taking such audit as herein-before directed, shall order the balance in the hands of the assignees to be forthwith divided amongst such of the creditors as shall have proved their debts; and such second dividend shall be final, unless any action at law or suit in equity be depending, or any part of the estate be standing out, not sold or disposed of, or unless some other estate or effects of the bankrupt shall afterwards come to the assignees, in which case they shall, as soon as may be, convert such estate and effects into money, and within two calendar months after the same shall be so converted, divide the same in manner aforesaid."

The following provisions of 6 G. 4. c. 16. respecting the disposition of unclaimed dividends, and the mode of applying for payment of a dividend against the assignees, are rendered of comparatively little importance by those of the Bankrupt Court Act, which take the proceeds of the bankrupt's estate out of the disposition of the official assignee.

Sect. 110. " And be it enacted, That if any assignee under any commission of bankrupt shall have, either in his own hands or at any bankers, or otherwise subject to his order or disposition, or to his knowledge in the hands of or in the order and disposition of himself and any co-assignee or co-assignees, or of any or either of them, any unclaimed dividend or dividends, amounting in the whole to the sum of fifty pounds, and shall not within six months after this act shall

(*p*) Eden, 378.

have taken effect, or two calendar months after the expiration of one year after the declaration and order of payment of such dividend or dividends made by the commissioners, either pay to the creditor or creditors entitled thereto, or cause a certificate thereof to be filed in the office of the Lord Chancellor's secretary of bankrupts, containing a full and true account of the name or names of the creditor or creditors to whom such unclaimed dividend or dividends is or are respectively due, and of the amount of such dividend or dividends respectively (such account being signed by the assignee or assignees rendering the same, and attested by the solicitor to the commission, or the solicitor to the assignee or assignees signing the same), such assignee or assignees shall be charged, in account with the estate of the bankrupt, interest upon such unclaimed dividend or dividends, to be computed from the time that such certificate is hereby directed to be filed, at the rate of five pounds per centum per annum, for such time as he shall thenceforth retain the same, and also such further sum as the commissioners shall think fit, not exceeding in the whole twenty pounds per centum per annum; and the Lord Chancellor, or the said commissioners, may order the investment of any unclaimed dividends in the public funds, or in any government security, for or on account of the creditors entitled, and subject to such order as the Lord Chancellor may think fit to make respecting the same, who, if he shall think fit, may, after the same shall have remained unclaimed for the space of three years from the declaration of such dividends by the commissioners, order the same to be divided amongst and paid to the other creditors; and the proof of the creditors to whom such dividends were allotted shall from thenceforth be considered as void as to the same, but renewable as to any future dividends, to place them *pari passu* with the other creditors, but not to disturb any dividends which shall have been previously made.

Sect. 111. "And be it enacted, That no action for any dividend shall be brought against the assignees by any creditor who shall have proved under the commission, but if the assignees shall refuse to pay any such dividend, the Lord Chancellor may, on petition, order payment thereof, with interest for the time that it shall have been withheld, and the costs of the application."

Consequences of Bankruptcy to Bankrupt himself.

Having described the mode in which the bankrupt's effects are distributed, let us turn to that unfortunate person himself. We have seen how he is, immediately after adjudication, summoned to surrender and conform; the punishments inflicted on him for disobedience; and the protection to which he may entitle himself by conformity; the power of commissioners to examine him, and their right to adjourn his last examination; which we will now suppose him to have passed without incurring any of those penalties inflicted on fraudulent and obstinate bankrupts by stat. 6 G. 4. c. 16. s. 112., which enacts,

“That if any person against whom any commission has been issued, or shall hereafter be issued whereupon such person hath been or shall be declared bankrupt, shall not before three of the clock upon the forty-second day after notice thereof in writing to be left at the usual place of abode of such person, or personal notice in case such person be then in prison, and notice given in the London Gazette of the issuing of the commission, and of the meetings of the commissioners, surrender himself to them, and sign or subscribe such surrender, and submit to be examined before them, upon oath, or being a Quaker, upon solemn affirmation; or if any such bankrupt upon such examination shall not discover all his real or personal estate, and how and to whom, upon what consideration, and when he disposed of, assigned, or transferred any of such estate, and all books, papers, and writings relating thereunto (except such part as shall have been really and *bona fide* before sold or disposed in the way of his trade, or laid out in the ordinary expence of his family); or if any such bankrupt shall not upon such examination deliver up to the commissioners all such part of such estate, and all books, papers, and writings relating thereunto, as be in his possession, custody, or power, (except the necessary wearing apparel of himself, his wife and children); or if any such bankrupt shall remove, conceal, or embezzle any part of such estate, to the value of ten pounds or upwards, or any books of account, papers, or writings relating thereto, with intent to defraud his creditors; every such bankrupt shall be deemed guilty of felony, and be liable to be

transported for life, or for such term, not less than seven years, as the court before which he shall be convicted shall adjudge, or shall be liable to be imprisoned only, or imprisoned and kept to hard labour, in any common gaol, penitentiary house, or house of correction, for any term not exceeding seven years."

The next subjects for consideration are, *his allowance*; his right to the *surplus*, if any, of his own estate; *his certificate*, and the consequences of his obtaining it.

Allowance.—The bankrupt's claim to an *allowance* is governed by the following sections of stat. 6 G. 4. c. 16.

Sect. 128. "Be it enacted, That every bankrupt who shall have obtained his certificate, if the net produce of his estate shall pay the creditors who have proved under the commission ten shillings in the pound, shall be allowed five per cent. out of such produce, to be paid him by the assignees provided such allowance shall not exceed four hundred pounds; and every such bankrupt, if such produce shall pay such creditors twelve shillings and sixpence in the pound, shall be allowed and paid as aforesaid seven pounds ten shillings per cent., provided such allowance shall not exceed five hundred pounds; and every such bankrupt, if such produce shall pay such creditors fifteen shillings in the pound or upwards, shall be allowed and paid as aforesaid ten pounds per cent., provided such allowance shall not exceed six hundred pounds; but if such produce shall not pay such creditors ten shillings in the pound, such bankrupt shall only be allowed and paid so much as the assignees and commissioners shall think fit, not exceeding three pounds per cent. and three hundred pounds."

Sect. 129. "And be it enacted, That in all joint commissions under which any partner shall have obtained his certificate, if a sufficient dividend shall have been paid upon the joint estate and upon the separate estate of such partner, he shall be entitled to his allowance although his other partner or partners may not be entitled to any allowance."

It will be observed that the allowance is only given in case the bankrupt obtains his certificate, that is a condition pre-

cedent, and to satisfy it the certificate must be allowed; (*q*) neither can he be entitled to receive it before a final dividend is made, because till then there is no mode of ascertaining its quantum. (*r*) However, his right to it becomes a vested interest, even before dividend, in such a manner that if he die it passes to his representatives. (*s*)

Surplus.—As the object of taking the bankrupt's property from him is to apply it towards the satisfaction of his debts, it follows that when those debts are completely satisfied the surplus, if any, ought to be restored to him. Accordingly, by 6 G. 4. c. 16. s. 132,

“The assignees shall, upon request made to them by the bankrupt, declare to him how they have disposed of his real and personal estate, and pay the surplus, if any, to such bankrupt, his executors, administrators, or assigns; and every such bankrupt, after the creditors who have proved under the commission shall have been paid, shall be entitled to recover the remainder of the debts due to him.”

In the case of a firm, the surplus of the joint estate must be apportioned according to the state of accounts between the partners. (*t*) There can, of course, be no surplus until the creditors have received twenty shillings in the pound; and they have a right also to interest, from the date of the fiat, on their respective debts.

Formerly those creditors only had a right to interest who had originally contracted for it, and, even then, a bond creditor was not entitled to interest beyond the penalty. (*u*)

(*q*) Exp. Pavey, 2 G. & J. 358. and see s. 130. post, 483. which takes away the allowance and certificate in certain cases of misconduct.

(*r*) Exp. Minchin, 1 M. & M. 135. Exp. Surridge, ib. 287.

(*s*) Exp. Safford, 2 G. & J. 128.

(*t*) Exp. Lanfear, 1 Rose, 442. Exp.

King, 17 Ves. 115. Exp. Taylor, 2 Rose, 175. Exp. Franklyn, Buck. 332.

(*u*) Bromley v. Goodere, 1 Atk. 75. Exp. Morley, 3 B. C. C. 79. 1 Ves. J. 132. Exp. Champion, 3 B. C. C. 436.

Exp. Hankey, ib. 504. Exp. Mills,

2 Ves. J. 295.

The legislature, however, considering, that a postponement of the sale of the bankrupt's property, might often increase its value, so as to create a surplus, and yet upon the whole be prejudicial to the creditors themselves, (v) thought fit to obviate their objections to such a postponement, by giving them interest out of the surplus. Accordingly, by 6 G. 4. c. 16. s. 132.

"The assignees shall not pay such surplus until all creditors who have proved under the commission shall have received interest upon their debts, to be calculated and paid at the rate and in the order following; (that is to say,) all creditors who debts are now by law entitled to carry interest, in the event of a surplus, shall first receive interest on such debts at the rate of interest reserved or by law payable thereon, to be calculated from the date of the commission, and after such interest shall have been paid, all other creditors who have proved under the commission shall receive interest on their debts from the date of the commission, at the rate of four pounds per centum."

Where the bankrupt is one of a firm, the right of his separate creditors to interest in the event of a surplus, is postponed to the right of the joint creditors to have their dividends made up to twenty shillings in the pound. (w) But the right of every creditor to interest is preferred to that of a partner or his assignee to prove, (x) and postponed to the bankrupt's claim of his *allowance*. (y)

(v) For instance, suppose the assets would have paid nineteen shillings in the pound if divided immediately, and twenty-one shillings after postponing the sale for four years; in such a case, at the end of the four years there would have been a surplus of one shilling in the pound, and yet the creditor would have been a loser, if we suppose, as we ought to do, that had he received nine-

teen shillings in the pound upon his debt, he would have made 4 per cent. per annum, during those four years, upon the whole amount of his dividend.

(w) Exp. Boardman, 1 Cox, 275. Exp. Clarke, 4 Ves. 677.

(x) Exp. Reeves, 9 Ves. 588. Exp. Ogle, Mont, 350.

(y) Exp. Morris, 2 B. C. C. 79. 1 Ves. J. 132.

Certificate.—At the commencement of this chapter it was observed that the policy of the bankrupt law comprehends two grand objects. *First.* The distribution of the debtor's effects in the most expeditious, equal, and economical mode; and, *Secondly*, the liberation of his person from the demands of his creditors, after he has made a full surrender of his property. Having sketched the means adopted by the legislature for the accomplishment of the former purpose, let us consider those by which it effects the latter.

By stat. 6 G. 4. c. 16. sect. 121,

“Every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made proveable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as herein-after directed; but no certificate shall release or discharge any person who was partner with such bankrupt at the time of his bankruptcy, or who was then jointly bound, or had made any joint contract with such bankrupt.”

Sect. 122. “And be it enacted, That such certificate shall be signed by four-fifths in number and value of the creditors of the bankrupt, who shall have proved debts under the commission to the amount of twenty pounds or upwards, or after six calendar months from the last examination of the bankrupt, then either by three fifths in number and value of such creditors, or by nine tenths in number of such creditors, who shall thereby testify their consent to the said bankrupt's discharge as aforesaid; and no such certificate shall be such discharge, unless the commissioners shall, in writing under their hands and seals, certify to the Lord Chancellor that such bankrupt has made a full discovery of his estate and effects, and in all things conformed as aforesaid, and that there does not appear any reason to doubt the truth or fulness of such discovery, and also that the creditors have signed in manner hereby directed, and unless the bankrupt make oath in writing that such certificate and consent were obtained without fraud, and unless such certificate shall, after such oath, be allowed by the Lord Chancellor, against which allowance any of the creditors of the bankrupt may be heard before the Lord Chancellor.”

The considerations respecting the certificate naturally divide themselves into those of the mode in which it is obtained ; the reasons for which it may be denied ; and its effect when granted.

As to the mode in which it is obtained.—It must, we will observe, *before* six calendar months from the bankrupt's last examination, be signed by four-fifths in number and value of his creditors to the amount of twenty pounds, *afterwards* by three-fifths in number and value, or nine-tenths in number ; and if the number of creditors be not exactly divisible, one must sign for the fraction over ; thus, if seventeen have proved, and more than six months have elapsed, then, as three-fifths of seventeen equal $10\frac{1}{5}$, eleven creditors must sign. (z) There is no mode of compelling creditors to sign a certificate ; the law has left it to their own caprice, under a high moral, but no legal obligation. (a) No creditor can be entitled to sign who would not be entitled to a dividend ; (b) nor can a creditor sign in his own right, and also in *auter droit*, ex. gr. as executor of another. (c)

In order that creditors may exercise this right with an unbiassed discretion, 6 G. 4. c. 16. sect. 125. provides,

“ That any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy as a consideration or with intent to persuade such creditor to consent to or sign such certificate, shall be void, and the money thereby secured or agreed to be paid shall not be recoverable, and the party sued on such contract or security may plead the general issue, and give this act and the special matter in evidence.”

The signature of the commissioners is also requisite ; this, however, 6 G. 4. c. 16. s. 124. prohibits them from affixing,

(z) Eden, 396.

(a) Per Lord Eldon, 18 Ves. 342.

(b) Exp. Buckner, Co. B. L. 439.

Radcliffe v. Gunson, 6 Madd. 193.

(c) Exp. Saumarez, 1 Atk. 85. Exp.

Stracey, 1 Rose, 66.

“ unless they shall have proof, by affidavit in writing, of the signature of the creditors thereto, or of any person thereto authorized by any creditor, and of the authority by which such person shall have so signed the same ; and if any creditor reside abroad, the authority of such creditor shall be attested by a notary public, British minister, or consul ; and every such affidavit, authority, and attestation shall be laid before the Lord Chancellor, with the certificate, previous to the allowance thereof.”

The right of the commissioners to refuse their signature, is like that of the creditors, subject to no appeal. (c)

It is further necessary that the certificate should be *allowed*. Before *allowance* it is a nullity. (d) The allowance is now, by the Bankrupt Court Act, in the Court of Review ; it may be opposed by any creditor, or by any person who shews reasonable ground for a claim, even by a partner of the bankrupt himself. (e) This brings us to the second subject of consideration, namely, that of *the reasons for which the certificate may be denied*.

The allowance of the certificate may be opposed, *First*, by shewing circumstances which render it improper for the court to grant it, although if granted, it would be available at law, *ex. gr.* that creditors have not proved in consequence of an unavoidable absence abroad ; (f) or, *Secondly*, by shewing circumstances which would invalidate it at law if allowed, for the court will not grant a certificate which it clearly sees would, if granted, be void. But the objection must be clearly established, since, by withholding the certificate, the court prevents the bankrupt from contesting the objection before a jury ; and therefore, in a case of mere suspicion, the court will not stay the

(c) Exp. King, 7 Ves. 417. See 7 East. 92. n. 13 Ves. 181. 15 Ves. 126.

(d) Exp. Sawyer, 1 Rose, 141.

(e) Exp. Hadley, 1 G. & J. 193. See 1 Atk. 83. 7 Vin. Abr. 134.

(f) Exp. Williamson, 1 Atk. 82.

Exp. Saumarez, ib. 84. Exp. Basarro, 1 Rose, 266. Exp. Lord, 2 Rose, 421. See Exp. Bentley, 2 Cox, 218. Exp. Warwick, 14 Ves. 138. Exp. Cockayne, 2 Rose, 233.

certificate; (g) and there is an exception to the general rule, that the court will not grant a certificate, which, if granted, would be invalid at law, in the case of a bankrupt uncertificated under a former fiat. (h)

A certificate may be invalidated at law by shewing that it was obtained by fraud; (i) for instance, that a creditor was induced by money to append his signature, even without the knowledge of the bankrupt; (k) though possibly in such a case it might be good, if there were signatures enough without that of the creditor so bribed, and if that creditor's signature were subsequent to the rest, so that it could not have operated as a decoy. (l) At all events, if the money were given without the bankrupt's knowledge, the court would, by cancelling the bad certificate, afford him the opportunity of procuring a new one. (m)

In the following cases, the certificate is void by 6 G. 4. c. 16. sect. 130.

“ And be it enacted, That no bankrupt shall be entitled to his certificate, or to be paid any allowance, and that any certificate, if obtained, shall be void, if such bankrupt shall have lost, by any sort of gaming or wagering (n) in one day twenty pounds, or within one year next preceding his bankruptcy two hundred pounds; or if he shall, within one year next preceding his bankruptcy, have lost two hundred pounds by any contract for the purchase or sale of any Government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered in pursuance of such contract; or shall, after an act of bankruptcy committed or

(g) Exp. Kennett, 1 Rose, 331. 1 V. & B. 193. Exp. Hall, 1 Rose, 3. Exp. Joseph, ib. 184. See Exp. Henderson, Buck. 557.

(h) Exp. Thompson, 1 Rose, 285.

(i) Horn v. Ion, 4 B. & Adol. 78.

(k) Robson v. Calze, Dougl. 228. Holland v. Palmer, 1 B. & P. 95. Exp.

Butt, 10 Ves. 360. Exp. Hall, 17 Ves. 63.

(l) Phillips v. Dicas, 15 East. 248. See 1 Mont. Di. 336.

(m) Exp. Harrison, Buck. 227 n.

(n) A loss of the requisite amount avoids the certificate, though the bankrupt, the same day, won more than he lost. Exp. Newman, 2 G. & J. 329.

in contemplation of bankruptcy, have destroyed, altered, mutilated, or falsified, or caused to be destroyed, altered, mutilated, or falsified, any of his books, papers, writings, or securities, or made or been privy to the making of any false or fraudulent entries in any book of account or other document, with intent to defraud his creditors, or shall have concealed property to the value of ten pounds or upwards; or if any person having proved a false debt under the commission, such bankrupt being privy thereto, or afterwards knowing the same, shall not have disclosed the same to his assignees within one month after such knowledge."

There are some cases in which a certificate will be *recalled*. It has been so for gaming. (o) But, as this is a harsh measure, it is unwillingly adopted. The application for it must be strongly grounded, and made within a reasonable time. (p)

Effect of Certificate.—The effect of the certificate is to exempt the bankrupt from payment of all debts which might have been proved under the bankruptcy. (q) The nature of those debts has been already considered. The mode in which he may avail himself of his statutory exemption is pointed out by st. 6 G. 4. c. 16. sect. 126. which enacts,

"That any bankrupt who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him for any debt, claim, or demand, hereby made proveable under the commission against such bankrupt, shall be discharged upon common bail, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence, and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certi-

(o) Anon. Dav. 437., cited 2 Rose. 187. n. Exp. Cawthorne, 19 Ves. 260. 2 Rose. 186. Exp. Tallis, 1 Ba. & Be. 321.

(p) Exp. Hovel, 1 G. & J. 219. Exp. Reed, Buck. 430. Exp. Mawson, 6 Ves. 614.

(q) See Greenway v. Fisher, 7 B. &

C. 436. Culliford v. Warren, 8 B. & C. 220. R. v. Edwards, 9 B. & C. 652. Lyde v. Mynn, 4 Simons, 508. where it was held that a party, who had granted an annuity, and covenanted to charge his future property with it, was not discharged from this covenant by bankruptcy.

ificate; and if any such bankrupt shall be taken in execution, or detained in prison for such debt, claim, or demand, where judgment has been obtained before the allowance of his certificate, it shall be lawful for any judge of the court wherein judgment has been so obtained, on such bankrupt's producing his certificate, to order any officer who shall have such bankrupt in custody by virtue of such execution, to discharge such bankrupt without exacting any fee, and such officer shall be hereby indemnified for so doing."

The means here pointed out, of taking advantage of the statute, are either by plea or motion. The form of plea given by the act must be adopted, (*r*) and must conclude to the country. (*s*) The certificate, and the allowance thereof, are declared sufficient evidence of the trading petitioning creditor's debt, act of bankruptcy, and other proceedings, up to certificate. (*t*) But it is a good answer, that the certificate itself was obtained by fraud, (*u*) or is void for any of the causes pointed out in the 130th section, or was obtained under a second fiat, a former one, under which the bankrupt's effects were assigned, being still undisposed of; for then the second is an absolute nullity; (*w*) or under a third fiat, issued against a person who has not paid fifteen shillings in the pound under the second; for the third is rendered a nullity by section 127. (*x*); which, vesting all the bankrupt's future property in his assignees under the second fiat, leaves nothing for the third to work upon. And though the certificate is rendered evidence of the fact of the issuing of the fiat under which it was obtained, it is no evidence of its validity. If the bankrupt obtain his certificate during the progress of a

(*r*) *Stedman v. Martinnant*, 12 East. Adol. 620. See *Nelson v. Cherril*, 8 664. 13 East. 427. *Charlton v. King*, Bingham. 316. *Till v. Wilson*, 7 B. & C. 4 T. R. 156. *Garland v. Warren*, 1 684. Camp. 363.

(*s*) *Sheen v. Garrett*, 6 Bingham. 686.

(*t*) See *Bateson v. Hartsink*, 4 Esp. 43.

(*u*) *Horn v. Ion*, 4 B. & Ad. 78.

(*w*) *Phillips v. Hopwood*, 1 B. &

(*x*) *Fowler v. Coster*, 10 B. & C. 427.

It was otherwise under the old bankrupt act, Stat. 5 G. 2. c. 30. s. 9. see the judgment in *Fowler v. Coster*, and see *Todd v. Maxfield*, 3 B. & C. 222. *Hovil v. Browning*, 7 East, 154.

suit, he should plead it *puis darrein continuance*; (y) but, although he neglect to do so, he will, if taken in execution, be entitled to his discharge on motion. (z)

The other mode, in which the bankrupt may claim the benefit of the statute, is by *motion*, which must be made before a judge; for the officer has no authority to discharge him on the production of his certificate. (a) Although the 126th section, by its express terms, directs only the discharge of a bankrupt *taken in execution*, the court may stay proceedings at an earlier period, when it is clear that they would lead to execution. (b) And though the 126th section speaks only of the discharge of the *bankrupt* out of execution, yet it appears, by coupling it with the 121st, that the legislature meant his property, as well as his person, to be secured; and, therefore, if the goods of a certificated bankrupt, acquired after the allowance of his certificate, be seized under a *fi. fa.*, the court will set it aside on motion; (c) and that, even, though it be suggested that the bankruptcy was collusive, and sworn that, in an action brought by the assignees, a jury has found against the fact of trading. (d)

But it is a good answer to a motion of this description that the *certificate* was fraudulently obtained or void, for those would be good answers to a plea of bankruptcy. (e)

The effect of the certificate in relieving the bankrupt is, in some cases, materially diminished by 6 G. 4. c. 16. s. 127. which directs,

“ That if any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any Insolvent Act, shall be or become bankrupt, and have obtained or shall hereafter obtain such

(y) *Todd v. Maxfield*, 6 B. & C. 105. M. & R. 196.

(z) *Humphreys v. Knight*, 6 Bingham. 573. *Todd v. Maxfield*, 3 B. & C. 222.

(a) *Sherwood v. Benson*, 4 Taunt. 631. and in order to ground the motion before a judge, the certificate must be enrolled and produced, *Jacobs v. Phillips*, 1 C.

(b) *Sadler v. Cleaver*, 7 Bingham. 769.

(c) *Davis v. Shapley*, 1 B. & Adol. 54.

(d) *Barrow v. Poile*, 1 B. & Ad. 629.

(e) *Nowers v. Coleman*, Buck. 5.

Sacey v. Frederici, 2 B. & P. 290.

Woolcot v. Leicester, 6 Taunt. 75.

certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission fifteen shillings in the pound, such certificate shall only protect his person from arrest and imprisonment, but his future estate and effects (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife, and children), shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing the commission."

This section seems to be applicable to cases where a first commission has issued, under the former Bankrupt Act, and a second under 6 G. 4. c. 16. (*f*) but is not applicable to cases in which both commissions issued under the former act. (*g*) The certificate under the second commission, though unavailable for the protection of the bankrupt's future property against his assignees, unless he have paid fifteen shillings in the pound, is yet a good defence to an action for any debt proveable under the second commission. (*h*) The composition with creditors, intended by this section, is a composition embracing all the bankrupt's creditors; not merely a particular class *ex. gr.* joint creditors : (*i*) but if it embrace all the creditors, the circumstance that some of them have not come in under it will not take the case out of the section. (*k*) Where a first fiat is superseded *by consent*, and a second issues under which the bankrupt's estate produces less than fifteen shillings in the pound, the case is within the section; not on account of the *former* fiat, for that is by the operation of the supersedeas as if it had never been, but because that the bankrupt is considered to have *compounded with his creditors*. (*l*)

(*f*) Robertson v. Score, 3 B. & Ad. 342.

(*g*) Carew v. Edwards, 4 B. & Adol. 351.

(*h*) Robertson v. Score, *supra*. Eicke v. Nokes, 1 M. & M. 303.

(*i*) Norton v. Shakespeare, 15 East. 619.

(*k*) Slaughter v. Cheyne, 1 M. & S. 182.

(*l*) Thornton v. Dallas, Dougl. 46. explained, Cullen, 394. Eden, 416.

There are some cases in which the courts will, in the exercise of their summary jurisdiction over their own officers, oblige an attorney, even after certificate, to refund money which he had fraudulently diverted to his own purposes before his bankruptcy. But to warrant this there must be a clear case of fraud. (*m*)

In order more completely to secure to the bankrupt the benefit of his exemption, stat. 6 G. 4. c. 16. s. 131. enacts,

“That no bankrupt after his certificate shall have been allowed under any present or future commission shall be liable to pay or satisfy any debt, claim, or demand, from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement made or to be made after the suing out of the commission, unless such promise, contract, or agreement be made in writing, signed by the bankrupt, or by some person thereto lawfully authorized in writing by such bankrupt.”

Such a contract, if properly entered into, will be valid, (*n*) for the certificate does not destroy the debt though it exempts the bankrupt, who cannot, however, be arrested upon any such contract. (*o*)

Of Supersedeas and of rescinding or annulling Fiats.

The power given by 1 & 2 W. 4. c. 56. s. 19. (*p*) to *rescind* or *annul* a *fiat*, answers to, and is substituted for, the power which formerly existed of *superseding* a commission.

A fiat may be rescinded or annulled for want of any of the requisites to support it, or for fraud in suing it out, misdescription of the bankrupt, or delay in proceeding on it. (*q*) But the application must be made in proper time; for the

(*m*) In the matter of Bonner, 4 B. & Ad. 811.

(*n*) Brise v. Braham, 1 Bingh. 281. 8 Moore, 261. Flemyng v. Hayne, 1 Stark, 370. Williams v. Dyde, Peake, 68.

(*o*) Peers v. Gadderer, 1 B. & C. 116; overruling Blackburne v. Ogle, 8 Price, 526. Accord. Bailey v. Dillon, 2 Burr. 736. Wilson v. Kemp, 3 M. & S. 595.

(*p*) Ante, p. 376.

(*q*) 4 Eden, 431.

Court will not rescind a fiat under which the bankrupt has obtained his certificate, unless its invalidity appear on the proceedings themselves, or unless there have been fraud : (q) nor will a bankrupt who has submitted to the fiat for a considerable time, be allowed to attempt to rescind it. (r)

A fiat may also be rescinded, by consent of all the creditors who have proved, (s) and before it has been opened, by that of the petitioning creditor. (t)

The consequence of rescinding a fiat is, that every thing that has been done under it becomes void. (u) The title of purchasers under the bankruptcy is defeated, (v) except in cases within the 87th section, (x) which, however, only prevents the bankrupt and persons claiming under him, from impeaching it after an acquiescence of twelve months; but has been held not to restrict assignees under a subsequent bankruptcy. (y) However, where there have been purchases, the court has refused to supersede, unless upon condition of the bankrupt's confirming them. (z)

We have already seen that a joint fiat may be rescinded as to some or one of the persons included in it, and remain in force against the rest. (a)

There is one case in which it is imperative on the court to supersede, viz. where a composition has been accepted in the manner specified by the following sections, the provisions of which are copied from the Scottish law, and were first introduced by 6 G. 4. c. 16.

(q) *Exp. Crowder*, 2 Rose, 324. *Exp. Levi*, Buck, 75. *Exp. Moule*, 14 Ves. 602. *Exp. Poole*, 2 Cox, 227. *Exp. Cutten*, Buck. 68.

(r) *Flower v. Herbert*, 2 Ves. 326. *Exp. Abel*, 1 G. & J. 199. *Exp. Lewis*, 2 G. & J. 208. See *Exp. Bass*, 4 Madd. 270.

(s) *Exp. Duckworth*, 16 Ves. 416. *Exp. King*, 2 Ves. Jun. 40.

(t) *Exp. Trigwell*, 1 V. & B. 348.

(u) 8 Ves. 534. 1 Atk. 145.

(v) *Exp. Jackson*, 8 Ves. 533. *Exp. Smith*, Buck. 262.

(x) *Ante*, 434.

(y) *Gould v. Shoyer*, 6 Bingh. 738.

(z) *Exp. Milner*, 19 Ves. 204. See *Exp. Edwards*, 10 Ves. 104. *Twogood v. Hankey*, Buck. 67.

(a) 6 G. 4. c. 16. s. 16. *ante*, p. 369.

Sect. 133. " And be it enacted, That at any meeting of creditors after the bankrupt shall have passed his last examination (whereof and of the purport of which twenty-one days notice shall have been given in the London Gazette), if the bankrupt or his friends shall make an offer of composition, or security for such composition, which nine tenths in number and value of the creditors assembled at such meeting shall agree to accept, another meeting for the purpose of deciding upon such offer shall be appointed, whereof such notice as aforesaid shall be given ; and if at such second meeting nine tenths in number and value of the creditors then present shall also agree to accept such offer, the Lord Chancellor shall and may, upon such acceptance being testified by them in writing, supersede the said commission."

Sect. 134. " And be it enacted, That in deciding upon such offer as aforesaid, any creditor whose debt is below twenty pounds shall not be reckoned in number, but the debt due to such creditor shall be computed in value; and that any creditor to the amount of fifty pounds and upwards, residing out of England, shall be personally served with a copy of the notice of the meeting to decide upon such offer as aforesaid, and of the purpose for which the same is called, so long before such meeting as that he may have time to vote thereat ; and such creditor shall be entitled to vote by letter of attorney, executed and attested in manner hereby required for such creditors voting in the choice of assignees ; and if any creditor shall agree to accept any gratuity or higher composition for assenting to such offer, he shall forfeit the debt due to him, together with such gratuity or composition ; and the bankrupt shall (if thereto required) make oath before the commissioners that there has been no such transaction between him or any person with his privity, and any of the creditors, and that he has not used any undue means or influence with any of them to attain such assent as aforesaid.

APPENDIX.

ON INSOLVENCY.

ALTHOUGH the law relating to *Insolvency* does not, strictly speaking, fall within the scope of this Treatise, being applicable, not to merchants and mercantile dealings alone, but to every class of persons alike; yet as it is a subject very interesting to the mercantile world, it was intended to insert a chapter in this book upon the Remedies of Creditors in case of their debtor's *insolvency*. The author has been deterred from this by the reflection that the law relating to insolvents is at the present moment in a course of change; that a Bill is pending before the Legislature, which, if passed, will materially alter its whole framework; and that the consequence of executing his first design would, therefore, in all probability, be, the introduction of a quantity of matter, which in a short time would become useless. He has, however, thought it proper to subjoin the following brief sketch of that part of the law, referring the reader for ampler information to the more extended treatises there cited.

When the insolvency of a debtor has become generally known, it usually happens that he or his friends, in the first instance, attempt to ward off the necessity of legal proceedings, by inducing his creditors either to give him time for the payment of the whole of his debts, or to discharge him, on a payment of part by way of composition. In the former case, viz. where time is given to the debtor for payment in full, the best and most formal mode of doing so is by an instrument termed a *Letter of Licence*, by which his creditors permit him to carry on his business without molestation from them for a time therein limited. They sometimes, for their own security, require that his affairs shall, in the meanwhile, be superintended and investigated by inspectors, in which case the instrument is termed

a *Deed of Inspection*. In the latter case, viz. where payment in part is accepted, the arrangement is commonly effected by what is sometimes called a *Deed of Composition*, sometimes *Deed of Trust*, or *Deed of Assignment*.

Agreements of this description are, generally speaking, under seal; where they are not, there must of course, as in the cases of other simple contracts, be some sufficient consideration to support them. On this subject it is held, that a separate agreement by a creditor, not under seal, to give time, in consideration of receiving the whole or part of his demand, at the end thereof, or to take part in exchange for the whole, is *nudum pactum* and invalid. *Co. Litt.* 212. 3 *Co.* 118. *Heathcote v. Crookshanks*, 2 *T. R.* 27. *Fitch v. Sutton*, 5 *East.* 230. However, the guaranty of a third person, or the substitution of something for, or the addition of something to, the debt; or an agreement to pay sooner, or at a different place than that at which it was demandable, are good considerations. *Co. Litt.* 212 b. *Steinman v. Magnus*, 11 *East.* 390. 3 *Co.* 118. But where the amount of the creditor's claim is disputable, an agreement on his part, to take a sum less than his original demand, may, it seems, be supported. *Longridge v. Dorville*, 5 *B. & A.* 117. See *Watters v. Smith*, 2 *B. & Adol.* 889. 4 *Mod.* 88. *Yelv.* 10. And where several creditors, each on the faith of the other's undertaking, agree to give time or to accept a composition, all will be bound, since each has the engagement of the rest, as a consideration for his own engagement. *Goode v. Cheeseman*, 2 *B. & Adol.* 328. *Reay v. Whyte*, 3 *Tyrwh.* 596. If indeed, one of the creditors be afterwards excluded from partaking with the rest in the benefits held out to him by the arrangement, he will cease to be, on his side, bound by it. *Garrard v. Woolner*, 8 *Bingh.* 258.

Where a creditor who enters into an arrangement of this kind holds at the time collateral securities, such as the acceptances of third parties, for the amount of his demand, those securities are not, it seems, affected by the agreement. *Thomas v. Courtney*, 1 *B. & A.* 1. See *Harrison v. Cortauld*, 3 *B. & Adol.* 36. *Sed vide dictum per Lord Eldon, in Exp. Glendinning*, *Buck.* 520. provided nothing be therein said concerning them. See *Stock v. Mawson*, 1 *Bos. & Pull.* 286. and *à fortiori*, they are not affected

by it, when the remedy upon them is expressly reserved. *Nicholls v. Norris*, 3 B. & Adol. 42. *Exp. Glendinning*, 1 Buck. 517. See *Boulton v. Stubbins*, 11 Ves. 22.

If the insolvent fail to accomplish any amicable arrangement with his creditors, his only course is to avail himself of certain enactments provided by the legislature for his relief. These are of three kinds, 1. *The Lords' Act*. 2. *The Small Debtors' Act*, and 3. *The General Insolvent Act*.

The Lords' Act, 32 G. 2. c. 28. s. 13. prolonged and amended by 26 G. 3. c. 44. 33 G. 3. c. 5. 37 G. 3. c. 85. 39 G. 3. c. 50. 49 G. 3. c. 6. 52 G. 3. c. 34. and 1 G. 4. c. 55. concerns only prisoners in execution for any sum not exceeding 300*l.* and consisted of two distinct parts; the one, enabling the insolvent to obtain his discharge on the performance of certain preliminaries therein marked out; the other, enabling his creditors to compel him to earn his discharge out of custody, by making a discovery and surrender of his effects, on which, his person is to be liberated, but his future effects remain liable to execution. The former part of this act, which enabled the prisoner to obtain his discharge on his own application, is, however, suspended by stat. 1 W. 4. c. 38. s. 10. during the continuance of the last mentioned statute, which is prolonged by stat. 2 & 3 W. 4. c. 44. to the 1st day of June, 1835, and thence until the end of the next session of parliament. For the construction of the latter branch, or as they are called, the *compulsive clauses* of the Lords' Act, the reader is referred to *Tidd's Practice*, 9th ed. 382.

Secondly. The Small Debtors' Act, 48 G. 3. c. 123. provides for the discharge from custody of debtors, who have been imprisoned for twelve successive calendar months, in execution upon any judgment for any debt or damages not exceeding 20*l.*, exclusive of costs: such discharge to be obtained by application in term time, to one of the superior courts at Westminster, but not to prevent execution from being taken out against the debtor's future effects. See *Tidd's Practice*, 9th ed. 386. and *Reg. Gen. Hild. T.* 1832. pl. 90.

Thirdly. The General Insolvent Debtors' Act consolidating and amending the former enactments on that subject, continues the court, which had been established by *Lord Redesdale's Act*, 53 G. 3. c. 102. amended and revised by many subsequent statutes, for the relief of insolvent debtors in England. This court is one of record, with power to administer oaths, compel the attendance of witnesses, and commit for contempt. (a) The persons who preside in it are called commissioners, any one of whom, has power to determine out of court, all matters relating to the petitioner, except his hearing, re-hearing, or examination: orders so made will be final, unless rescinded by the court, when it next sits, (b) which it is required to do twice a week at least, except during a period limited by sect. 5. Three of the commissioners are from time to time to make circuits, on which they have the same powers as the court in London. (c)

Any person in prison for any debt, damages, costs, sum of money, or contempt of court by non-payment of money or costs, may, within fourteen days after the commencement of his custody or afterwards, if the court permit him, petition this tribunal for his discharge, in the manner prescribed by sect. 10. executing at the same time, an assignment to an officer called *the provisional assignee* of the court, of all the property he then possesses, or may possess before his discharge under this act, except his wearing apparel, bedding, and other such necessities and working tools not exceeding the value of 20*l.*, which agreement will, however, become void, if his petition be, as it may be, dismissed. (d) The filing of the petition is so complete a submission of his affairs to the court, that he cannot afterwards be superseded or discharged out of custody, for any matter on which an adjudication can, by virtue of this act, be made. (e)

The Provisional Assignee may seize and sell the property thus conveyed to him, and sue in his own name, by the direction of the court, for the purpose of enforcing the rights of the insolvent, and so

(a) Sect. 3. (c) Sect. 6. to 8. (d) Sect. 11. (e) Sect. 15.

(b) Sect. 4.

if he die or resign, may his successor. (*f*) The court may, at any time after the filing of the petition, appoint a creditor of the insolvent assignee, upon whose acceptance of the appointment, the *provisional assignee* is to convey to him all the insolvent's property, which vests in him by relation, as if the conveyance had been made by the prisoner. (*g*) Immediately after accepting this conveyance, he is to get in and sell the property, unless ordered, as he may be by the court, to delay the sale, or to mortgage instead of selling; (*h*) he may execute powers which the insolvent might have executed for his own benefit, (*i*) accept or reject leases in the same manner as the assignees in bankruptcy, (*k*) and may, with the consent in writing of the major part in number and value of the creditors, commence suits, which will not be abated by his death or removal, compound debts and submit differences to arbitration. (*l*) But his power does not extend to the income of a benefice, though he may obtain a sequestration of its profits, (*m*) nor to the half pay or pension of a military or civil officer, in the King's or East India Company's service, though a portion of it may be obtained with the consent of government, or of the Court of Directors, as the case may be. (*n*) Sect. 30. contains provisions respecting goods in the ordering and disposition of the insolvent, precisely similar to those in 72d section of the Bankrupt Act, with a proviso in favour of ship-owners, similar to that mentioned, ante. p. 105. The provisions of the 31st section, concerning the right of an insolvent's landlord to distrain, were copied from the 74th section of the Bankrupt Act. Voluntary assignments of his property, or any part of it made by the prisoner within three months before his imprisonment, when in insolvent circumstances, and with the view of taking the benefit of the act, to, or for the benefit of, any creditor, are declared fraudulent and void against his assignees. (*o*) Sect. 33. extends to assignees of an insolvent, the benefit of st. 3 G. 4. c. 39. entitled *An Act for preventing frauds on creditors by secret warrants of attorney to confess judgment*; and the 34th section invalidates all executions, and sales under executions, on

(*f*) Sect. 16.(*i*) Sect. 22.(*l*) Sect. 24. 26.(*n*) Sect. 29.(*g*) Sect. 19.(*k*) Sect. 23.(*m*) Sect. 28.(*o*) Sect. 33.(*h*) Sect. 21.

judgments by warrant of attorney or cognovit, taking place after the commencement of the insolvent's imprisonment.

Within three months from the time of his appointment, the assignee is to file his account on oath, and, if he have the means, proceed to make a dividend among the creditors in the manner directed by sect. 35. which also prescribes the mode in which the amount of debts is to be ascertained. Large powers are given to the court for the purpose of compelling the performance of the duties of the assignees, whom the commissioners may, if they think fit, remove. But no dividend can, without the express order of the court, be made before *adjudication*, the proceedings to which are as follows:

Within fourteen days after his petition, *unless further time be granted by the court*, the prisoner is to subscribe and deliver a *schedule*, containing a full description of himself, his debts, and the persons who are or claim to be his creditors, together with the nature of their claims; and an account of all his estate and effects, and of the wearing apparel, bedding, and tools of trade, which are, as we have seen, excepted out of his conveyance of his property to the provisional assignee. (p) A time is then appointed for hearing the matters of the petition (q) and schedule, before the court, in London, Southwark, Surrey, and Middlesex, in other parts of England, before a commissioner on circuit, and in Wales and Berwick, before the justices at sessions. Notice of the time of the intended hearing is given to the creditors, (r) who may, if they think fit, oppose the insolvent's discharge in the mode pointed out by the act. (s) When the hearing is ended, the court may, on the prisoner's swearing to the truth of the matters in his petition and schedule, and executing the warrant of attorney hereafter mentioned, pronounce its adjudication, directing the prisoner's discharge from custody, and declaring him entitled to the benefit of the act, as to all debts and claims mentioned in his schedule, or unknown to him at the time of *adjudication*. (t) This discharge may be either forthwith, or may be postponed for a period not exceeding, in common cases, six months; (u) but if the insolvent have committed *fraud* against the policy of this act, three

(p) S. 40.

(q) S. 41.

(r) S. 42.

(s) S. 43.

(t) S. 46.

(u) S. 47.

years; (w) and if he have fraudulently contracted any debt, vexatiously delayed any creditor, incurred damages in an action for criminal conversation, seduction, breach of promise of marriage, slander, libel, or malicious tort or trespass, he may be discharged, as to other demands, forthwith, and detained, in respect of such debts, for a period not exceeding two years. (x) In cases, where the prisoner is detained, the court may order the detaining creditor to pay him an allowance of not more than four shillings a week during his imprisonment. (y)

By virtue of the adjudication and a warrant issued to the gaoler thereupon, the prisoner is discharged out of custody. But, we have seen, that, before adjudication, he is required not only to verify, by oath, the matter in his schedule and petition, but to execute a warrant of attorney. This warrant of attorney authorises the entering up a judgment against him, at the suit of the assignee, for the amount of his debts remaining unpaid; it has the force of a recognizance, and the court may, at any future period, if the prisoner, or his estate after his death, be of sufficient ability to liquidate that amount, or any part of it, permit execution to be taken out, upon such judgment, against his then property. (z) If the insolvent should, after his discharge, become possessed of property incapable of being taken in execution, the court may require him to assign it for the satisfaction of his debts; (a) and, in case of disobedience, may commit him. But he cannot be imprisoned, either by virtue of the judgment above-mentioned, or, of process, on account of any debts as to which he has become entitled to the benefit of the act, unless the adjudication were made without notice (where notice is by this act required,) being given to, or dispensed with by, the plaintiff issuing the process against him. (b) Nor can any *fiery facias*, or *elegit*, issue on any judgment obtained for any such debt, or in any action on any new contract or security for the payment thereof, except on the judgment entered up against him according to this act. And if any action, or *scire facias*, be brought against him for such debt, or on such contract, he may

(w) S. 48.

(x) S. 49.

(y) S. 56.

(z) S. 57.

(a) S. 58.

(b) S. 60.

plead the act in his defence. (c) When the debts, in respect of which the adjudication was made, have been all satisfied, the court may order the warrant of attorney to be cancelled, and satisfaction to be entered on the judgment.

The above is an outline of the system created by the statute. It contains other enactments; providing for the cure of errors happening in the schedule, without fraud on the insolvent's part: (d) denying the benefit of this act (except in certain cases,) to uncertificated bankrupts, and persons who have previously been discharged as insolvent; (e) and to a prisoner who has removed himself by *habeas corpus* after an *arrest* at his usual place of abode, until he be removed back again thereto; (f) permitting the removal of prisoners to their usual place of abode, after an arrest elsewhere; (g) providing for rehearing, and reversal, in case of an adjudication improperly obtained; (h) and the revocation of erroneous orders of discharge; (i) for the examination, if necessary, of a prisoner, concerning his estate and effects, even after his discharge; (k) and for his punishment, in case of his wilfully omitting any thing out of his schedule; (l) marking out the peculiar course of proceeding to be adopted, in case the prisoner be a married woman; (m) a lunatic; (n) a crown debtor, (o) or in custody by force of crown process; (p) or the hearing is to take place before a commissioner or justices; (q) and the mode in which the proceedings of the court are to be given in evidence: (r) providing for the appointment of examiners, for the purposes of the act; (s) the indemnity of persons acting in obedience to the court; (t) the admission of attornies to practise in it: and exempting its proceedings from stamp-duty, (u) and sales of the prisoner's estate from auction-duty. (w)

This act was originally limited to continue till the first of June, 1829, and thence till the end of the next session of parliament. It

(c) S. 61.	(d) S. 63.	(e) S. 64.	(f) S. 66.
(g) S. 65.	(h) S. 67.	(i) S. 68.	(k) S. 69.
(l) S. 70.	(m) S. 72.	(n) S. 73.	(o) S. 74.
(p) S. 75.	(q) S. 77.	(r) S. 76.	(s) S. 79.
(t) S. 81.	(u) S. 87.	(w) S. 87.	

was further continued, by 1 W. 4. cap. 38. and 2 & 3 W. 4. c. 44., which also contain a few provisions, facilitating the course of proceedings. By st. 3 and 4 W. 4. c. 47. his Majesty is enabled to appoint the judges of the Court of Bankruptcy, other than the chief, or any of them, to act as commissioners of the Insolvent Debtors' Court; and the judges and commissioners are empowered to extend their circuits into the principality of Wales.

ADDENDA.

Page 16, note (u), add " See in support of the distinction in the text, *Wilson v. Cutting*, 10 Bingh. 436."

Page 33, note (g), add " See *Boswell v. Smith*, 6 C. & P. 62."

Page 45, *ad finem*, By stat. 57 G. 3. c. 60. the admission fee of forty shillings has been increased to five pounds, and the penalty of £25. to £100.

Page 54, note (u), *ad finem*, See also *Turner v. Robinson*, 6 Carr. & P. 16. and the cases there cited by Pollock, *arguendo*. *Shaw v. Arden*, 9 Bingh. 287. *Gill v. Lougher*, 1 Tyrwh. 124. and see post. p. 267.

Page 55, note (w), add " *Brown v. Croft*, 6 C. & P. 16. n. (g)."

Page 67, note (p), *ad finem*. The principal may, of course, render such a transaction valid by adopting it. *Gibson v. Winter*, 5 B. & Adol. 99.

Page 71, note (c), add " See *Colburn v. Patmore*, 1 Cr. Mee & Ros. 73."

Page 75, note (a), *ad finem*. It is, *generally speaking*, more advisable to sue in the name of the principal than in that of the agent; for if that of the agent be used, any thing which would constitute a good defence against him, will be an answer to the action. *Gibson v. Winter*, 5 B. & Adol. 101. where all the authorities are cited.

Page 79, line 15. This view of the law is supported by the late case of *Parrott v. Eyre*, 10 Bingh. 283, in which Tindal, C. J. left it to the jury to say whether trustees of a road, who had contracted in mode different from that in which the act of parliament directed, (that the funds of the road should be bound,) had contracted on the credit of the road, or on their own credit.

Page 90, note (r). See on the construction of this enactment, *Suart v. Powell*, 1 B. & Adol. 266.

Page 101, note (u). See on the construction of this section, *Rex v. Philp*, 1 Moody's Cr. Ca. 274.

Page 106, line 6, after *apply to it*. See *Rex v. Philp*, 1 Moody's Cr. Ca. 274. whence it appears that in order to hold shares in joint-tenancy it is not necessary that they should be partners in trade at the time of acquiring those shares.

Page 138, note (n). However in *Henderson v. Appleton*, 3 Tyrwh. 660. it was held, that where country bank notes were paid by a vendee to a vendor, after the bank had stopped, the vendor having offered to return them on the day on which, by course of post they might have been presented, might maintain assumpsit for goods sold and delivered.

Page 177, note (u). Even though the word "assigns" be omitted, it will be transferable by indorsement, if such be the custom of merchants. *Renteria v. Ruding*, 1 M. & M. 511.

Page 284, note (k), and vide *Howell v. Jones*, 1 Cr. Mee. & Ros. 97.

Page 285, note (m), add "*Howell v. Jones*, 1 Cr. Mee. & Ros. 97."

Page 294, line 24, after "evidencing such an intention," add "or by an acceptance or part payment after its completion. *Elliot v. Pybus*, 10 Bingh. 512."

Page 297, after "*delivery*," line 5, "see this act remarked on by Tindal, C. J. in *Elliott v. Pybus*, 10 Bingh. 512."

Page 299, note (b), add "see *Elliott v. Pybus*, 10 Bingh. 512."

Page 303, line 15, after the words "*and as it seems the price*," add "where a specific price has been agreed on by the parties, for where no price has been named, the parties are understood to have agreed that such a sum shall be paid as the article is reasonably worth. *Hoadly v. M'Laine*, 10 Bingh. 482. This case was decided since the printing of the present chapter."

Page 314, note (z). The doubts expressed by Tindal, C. J. in *Acabal v. Levy*, and above stated, are now cleared up by *Hoadly v. M'Laine*, 10 Bingh. 482. which decides that where the agreement is executory, if no specific price have been stipulated for, the parties shall be taken to have agreed that such a sum shall be paid as the article is reasonably worth.

Page 340, note (f), add "*Atkinson v. Cotesworth*, 3 B. & C. 647."

Page 414, line 18, add "and so are interlocutory costs awarded at N. P. against the bankrupt for not proceeding to trial, and taxed before the bankruptcy. *Jacobs v. Phillips*, 1 Cr. Mee. & Ros. 199."

Ibid. note (n), *ad finem*, add "see dictum of Lord Lyndhurst, 1 Cr. Mee. & R. 201."

ERRATA.

Page 9, note (g), line 4, for 2 Jac. & W. 200. read 2 Jac. & W. 266.

— 45, line 13, for first stated, read just stated.

— 319, — 6, for the vendee has the property, read the vendor has the property.

— 357, — 23, for assign them, read assign it.

— 365, — 11, for By 1 G. 4. c. 16. s. 15, read By 6 G. 4. c. 16. s. 15.

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THE END.

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